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COURTROOM WARS: CONSTITUTIONAL BATTLES OVER CONSCRIPTION IN THE
CIVIL WAR NORTH

A dissertation submitted
to the University of Mississippi in partial
fulfillment of the requirements for the
degree of Doctor of Philosophy

by

Nicholas Matthew Mosvick

May 2019

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ABSTRACT

In February 1863, Congress considered a bill to create for the first-time conscription at the national level. Democratic politicians vigorously protested that the proposed act was unconstitutional and destroyed the state militias. When Congress passed the Enrollment Act, commonly known as the “Conscription Act,” on March 3, 1863, outcry from Democrats about the unconstitutionality of national conscription immediately followed. In New York and Pennsylvania, Democratic newspaper editors and politicians decreed the act the worst among the Lincoln war measures in threatening to subvert the constitutional republic and to transform the United States into a despotism under the control of an autocratic President. The act was “utterly repugnant” to the Constitution and the structure of federalism that left states to control their own militias. Quickly, these constitutional criticisms transformed into court challenges to the act. These challenges were usually based on drafted soldiers seeking writs of *habeas corpus* to be released from federal authority in the form of the provost marshal. New York state courts focused most often on the question of state jurisdiction, with New York’s judges divided on the meaning of the Supreme Court precedent of *Ableman v. Booth* and whether it precluded state court jurisdiction over questions concerning the constitutionality of Congressional acts by writ of *habeas corpus*. One judge, John McCunn of the City Court of New York and a well-known Democrat connected to Tammany Hall, issued an opinion in the midst of the New York City Draft Riots claiming that the act was unconstitutional, but New York’s higher courts never answered the question. In Pennsylvania, both federal and state courts decided on the constitutionality of conscription. Federal District Court Judge John Cadwalader upheld the power to conscript in two 1863 decisions but frustrated the Lincoln administration both by maintaining a role for federal judges to review the decisions of the Boards of Enrollment and his issuing of writs of *habeas corpus* to release soldiers. The Pennsylvania Supreme Court issued the most important case on the subject in November 1863, *Kneedler v. Lane*, finding the Conscription Act constitutional. The constitutional conservative victory was short-lived, as the decision was overturned two months later. As the history of twentieth-century conscription cases evidences, it would be the last time the courts seriously considered the constitutional argument against conscription.

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INTRODUCTION

In the middle of 1863, New York's *Metropolitan Record* published a pamphlet imaging President Lincoln on trial for crimes against the Constitution. In the "Trial of the Constitution," Lincoln was charged by the "Spirit of the Constitution" with violating the Constitution with every war-time measure passed by his administration and the Republican Congress. The "Trial of the Constitution" envisioned the Founding Fathers, from Washington to Jefferson to Madison to Hamilton, alongside the political triumvirate of Webster, Clay, and Calhoun putting Lincoln on the stand to be cross-examined. They accused Lincoln of ignoring the long-standing constitutional traditions dear to many Americans, through his war policies of suspending *habeas corpus*, his emancipation policy, and putting the whole able-bodied male population at his command by conscription. The pamphlet called conscription an infamous law that was not only "subversive of the Constitution" but also but transgressed state sovereignty.¹ It was a visceral image that encapsulated the contentious public constitutional debate occurring throughout 1863 in the north over Lincoln's war measures.

While constitutional conservatives challenged policies like confiscation, emancipation, and the suspension of *habeas corpus* on constitutional grounds, the locus of public constitutional debates in 1863 centered on conscription. By the twentieth century, from the terrors of the

¹ "Trial of Abraham Lincoln by the great statesmen of the republic: A council of the past on the tyranny of the present. The spirit of the Constitution on the bench-Abraham Lincoln, prisoner at the bar, his own counsel," *New York Metropolitan Record* (1863), 5-11.

trenches in World War I to the horrors of the Vietnam War, judicial receptivity to constitutional claims against conscription had faded even if many remained convinced the draft is unconstitutional. This dissertation shows that most constitutional arguments against conscription were exhausted during the Civil War and while the twentieth century saw new spins upon those constitutional objections, the judiciary become unwilling to listen despite attempts to revisit the issues despite the serious challenges brought before them.

As Timothy Huebner suggests, nineteenth-century Americans embraced a constitutional culture that looked to protect the traditions of the founding generation. Shared constitutional culture refers to the ways in which nineteenth-century Americans saw the Constitution as a central feature of intellectual life. The popular veneration for the founders' Constitution helped develop American nationalism, as the "memory and history of the creation of the republic formed the basis of a nascent national identity that bound Americans."² Nineteenth-century Americans spoke regularly about the Constitution in newspapers, letters, and political resolutions and were genuinely committed to the maintenance of the founders' Constitution. That commitment was thick and genuine in the sense that Americans at the time did not treat constitutional values as a substitute for political ideology but believed upholding the Constitution's meaning was part of their identity as Americans. Notably, constitutional culture transcended political ideology, forcing both Democrats and Republicans to take constitutional arguments seriously and to stake out respective constitutional values. Americans expected their political representatives to speak constitutionally and address the constitutional issues of the day. Thus, constitutional conservatives felt that their best avenue for redress against the Conscription Act was through public constitutional debates and judicial action, not extrajudicial violence or

² Timothy Huebner, *Liberty and Union: The Civil War Era and American Constitutionalism* (Lawrence: University of Kansas Press, 2016), 19.

protest like the New York City draft riots or other popular constitutional action. They crafted plausible, well-considered arguments with older roots in the Jacksonian tradition and the broader constitutional culture. Supporters of conscription, who held the same common constitutional culture values, responded in kind, certain that the founders' Constitution and past tradition granted the federal government sufficient power to pass national conscription. This dissertation highlights this constitutional resistance through the study of previously understudied and unearthed court cases, petitions, and briefs alongside extensive research of newspapers and the congressional record which constituted the public constitutional debate.

Conscription in the north during the American Civil War is a prime example of the expansion of federal power that occurred as a result of the war. Despite the overwhelming volume of historical inquiry into the American Civil War, relatively few works of history have been focused solely on the constitutional history of the war, let alone conscription itself. Yet, the battles over the constitutionality of conscription in the courtroom reflect the high stakes of deciding constitutional issues during the nation's bloodiest war. The result of these battles was contingent, as it briefly appeared that the Supreme Court could take a case on appeal to strike down conscription. This case was *Kneedler v. Lane*, decided on November 9, 1863 by the Pennsylvania Supreme Court, which represented a high-water mark for constitutional conservatives opposing conscription. The 3-2 decision saw three Democratic state judges, led by Chief Justice Walter H. Lowrie, emphasize the threat the Conscription Act posed to antebellum federalism and the residual powers of states over their militias. The Court issued a temporary injunction which theoretically precluded federal officers from administering the draft in Pennsylvania, but the federal government moved quickly to reverse the decision and by January, with Lowrie replaced by the constitutional nationalist Republican Daniel Agnew, the injunction

was reversed. It was as close as constitutional conservatives got to achieving their goal of getting the issue before the Supreme Court to finally strike down the act.

When the Civil War broke out in 1861, conscription was widely considered a tyrannical measure only resorted to by despots. Voluntarism was the preferred method of recruiting an army in a democratic republic and resorting to conscription implicitly suggested the failure of volunteer citizen-soldiers. In the largest conflict before the Civil War, the Mexican-American War, over 68 percent of the soldiers who fought were volunteer citizen soldiers. As historian Peter Guardino shows, nineteenth-century Americans distrusted the regular army and saw it as a “last resort” for desperate laborers.³ However, after the failures of the Militia Act of 1862, the Union established national conscription in March 1863 through the Enrollment Act-known to its critics as the “Conscription Act.”⁴ The act authorized the enrollment and drafting all eligible male citizens twenty to forty-five, including those aliens who declared their intention to become citizens. Enrolled men were divided into classes based on age, with those between twenty and thirty-five to be drafted first. Exemptions were granted to those families with two or more men already serving, but no occupational or religious exemptions were authorized by the act, and male citizens could also avoid the draft by paying a \$300 commutation fee or securing a substitute. Section fourteen allowed for exemptions to be granted only once a citizen was

³ Carl Edward Skeen, *Citizen Soldiers in the War of 1812* (Lexington: University of Kentucky Press, 1999), The two legacies of England passed to American colonists were fear of standing armies and a reliance upon citizen soldiers, or militiamen, for defense, noting that 164,087 of the 395,858 men-41.5%- who served in the Revolutionary War were militiamen; Peter Guardino, “Gender, Soldiering, and Citizenship in the Mexican-American War of 1846-1848,” *American Historical Review*, Vol. 1 (2014), 26-27 Guardino notes that both sides in the Mexican-American War did not trust their regular army forces, a “last resort” for laborers, and used thousands of citizen-soldiers, with the United States enrolling volunteers in regiments for limited terms-in total, American forces were 27,000 regular army soldiers and 59,000 volunteers, or 68.6%. Still, during the War of 1812, 458,000 out of the 528,000 soldiers who fought were militiamen, while only six regiments were volunteer regiments. Donald R. Hickey, *The War of 1812: A Forgotten Conflict*. (Urbana: University of Illinois Press, 1989), 77.

⁴ “An Act for Enrolling and Calling Out the National Forces, and for Other Purposes (The Enrollment Act),” Act of March 3, 1863, 12 Stat. 731 (1863) *Hereinafter* known as “The Conscription Act.”)

actually drafted. Ultimately, the draft brought many more men into the army by bounty and substitution than by conscription itself.⁵

The wartime expansion of the central Federal government were embodied by conscription and the suspension of *habeas corpus* and these significant, novel changes were contested in state courts. Although President Davis and the Confederate Congress had instituted national conscription by April 1862, the arrival of conscription in the north was wholly new to its citizenry.⁶ My contribution is to resurrect the significance of the overlooked public constitutional debate over conscription by constitutional conservatives in the north. This dissertation reveals the intensity of the debates and the ways constitutional opponents of conscription employed the Constitution as their preferred tool to oppose the draft. Finally, it adds to both the narrative of nineteenth-century constitutional culture and to the expansion of the national government both during and after the Civil War.

Ultimately, the participants in this public constitutional debate hoped to influence the courts with their arguments. This public debate is the first part of the story, which shows how constitutional conservatives and constitutional nationalists crafted and spread their arguments in Congress and the press. The second part of the story is showing how judges and lawyers brought this debate within the courts. To understand how the government nearly lost the constitutional battles over conscription, this dissertation explains how suits challenging conscription in New York and Pennsylvania primarily came by writs of *habeas corpus*. Although it is not a focus of

⁵ James W. Geary, *We Need Men: The Union Draft in the Civil War* (Dekalb: Northern Illinois University Press, 1991), 66. 65% of those examined under the 1863 draft call were released for physical disability or hardship and of the 88,171 men held to service, 52,288 paid the \$300 fee and 26,002 furnished substitutes. Thus, only 9,881 men became conscripts in 1863 out of 292,441 called out. *Ibid*, 67. Overall, of the 1,261,567 troops raised between 1863 and 1865, 46,347 were conscripts, or 3.67%, and 118,010 were substitutes, or 9.35%, leading to a total of 164,357 men or 13% brought to the Union army by the draft. *Ibid*, 84.

⁶ Act of April 16, 1862, *Statutes at Large of the Provisional Government of the Confederate States of America*, 1st Sess., chap. 31, 29-32.

this dissertation, the vast majority of these *habeas* cases were suits on the behalf of minor soldiers. Significantly, they came before both state and federal judges, including the central judicial figures of this dissertation such as Eastern District of Pennsylvania Judge John Cadwalader and Judge George Washington Woodward of the Pennsylvania Supreme Court. These were generally not constitutional cases like *Kneedler*, but allegations by parents that their minor child was in the “unlawful custody and control” of a federal officer and “illegally restrained of his liberty” without being charged with a crime.⁷ While these cases are an important part of *legal* resistance to the Conscription Act, they tell us little about *constitutional* resistance outside the desire of constitutional conservatives to maintain the right of parents to file for *habeas* writs in state court. The core objections to conscription never wavered from a focus on preserving antebellum federalism, but many courtroom battles hinged instead on the propriety of state court jurisdiction over *habeas* claims against federal draft officers.

As chapter two explains, those legal conflicts over jurisdiction harkened back to the conscription debates during the War of 1812 and the jurisdictional battles over the Fugitive Slave Act in the 1850s which resulted in the Supreme Court’s 1859 decision in *Ableman v. Booth* which appeared to end such state jurisdictional claims.⁸ Broadly, this dissertation argues the

⁷ These cases were consistent in their language and claims, referring to minors not being legally competent to enroll in the army. See *In Re John Reed* (E.D. Pa. September 4, 1863) Judge Cadwalader granted writ, soldier taken before he was 19, restrained of his liberty without any criminal charge by the Provost Marshal; *In Re Cyrus A. Bell* (E.D. Pa. August 22, 1863); *In Re Connell* (E.D. Pa. September 7, 1863) Father claimed son was drafted against his consent, “contrary to the Act of Congress”-the Conscription Act; The exception was a claim like James Larash’s, which was based on the July 1862 Militia Act and argued he had “not entered into the service of the United States in pursuance of the said draft” and improperly held in custody as a deserter. *In Re Larash* (E.D. Pa. September 14, 1863). Similar arguments were made in state court. See *Kern v. Wright*, Pennsylvania State Archives Before Chief Justice Walter Lowrie of the Supreme Court of Pennsylvania, arguing that he was “illegally and wrongfully for no criminal or supposed criminal matter” held by Captain Wright; *Petition for Habeas Corpus To the Honorable James Thompson*, July 22, 1863, Pennsylvania State Archives Judge Thompson ordered Colonel Small to discharged Emile Badger; *To the Honorable George W. Woodward and the Justices of the Supreme Court of Pennsylvania*, March 17, 1863, Pennsylvania State Archives Henry and Clara Boyle petitioned the Supreme Court on behalf of Alfred Henry MacNeil as a minor and Woodward granted the writ; *Sharpley v. Finnie*, *Petition to Eastern District*, Pennsylvania State Archives.

⁸ *Ableman v. Booth*, 62 U.S. 506 (1859).

constitutional controversy over conscription and other Union war policies can be seen as a continuation of the constitutionalism in the north regarding the Fugitive Slave Act. In both cases, citizens were confronted with unprecedented expansions of governmental power that had a profound impact upon individuals. In the case of the Fugitive Slave Act, the federal government could suddenly compel individual northerners to aid in the capture of fugitive slaves in northern states. Northern citizens were asked as a result to confront issues of slavery and federalism against the backdrop of individual rights. Conscription similarly asked northern citizens to forcibly give their bodies and labor to the federal government in aid of the war effort.

The primary constitutional opposition to conscription came from constitutional conservatives.⁹ They occupied a kind of middle ground between the radical Peace Democrats of Clement Vallandigham and Fernando Wood and War Democrats who fiercely support the war measures of the Lincoln Administration as necessary to win the war and preserve the republic. As historian William Harris observes, many historians have contrasted War and Peace Democrats, with war Democrats having a traditional adherence to strict construction while supporting most war policies. Often ignored in accounts of the Civil War are those Democrats who “remained faithful to the old party of Andrew Jackson” and its constitutional tenets while supporting the war but opposing Lincoln and the Republicans.¹⁰ Constitutional conservatives

⁹ This dissertation employs “constitutional conservatives” in order to link the constitutional resistance to conscription back to a long tradition of skepticism of federal power which included ensuring the federal government could not usurp state power over the militia. The term is used both in the historiography and by historic actors and remains a common term deployed to signal the belief that government should be limited by the text, structure, and traditions of the Constitution

¹⁰ William C. Harris, *Two Against Lincoln: Reverdy Johnson and Horatio Seymour: Champions of the Loyal Opposition*, (Lawrence, University of Kansas Press, 2017). 2. Constitutional conservatives opposed the adoption of “radical and rash measures” that might have established “unwise constitutional and political precedents.” Despite the “shrillness of their language,” they pursued a “conservative course” between the Republicans and Copperheads. *Ibid* 216. As an example of the split between constitutional or Jacksonian conservatives and Vallandigham, in March 1863, during a meeting of Democrats in Albany, New York, Seymour insisted to Vallandigham that Northeastern Democrats opposed any peace party that conceded Southern independence and that he would not abide by an anti-war platform for the party, forcing Vallandigham to tone down

were loyal Democrats who saw Republican policies as unwise precedent and a serious threat to civil liberties and the system of federalism established by the founders. They opposed the Conscription Act primarily as unconstitutional because it altered the system of federalism as originally constructed by the founders or “antebellum federalism.”¹¹ As Jack Rakove notes, “respect for federalism was a dominant value of early nineteenth-century and antebellum constitutionalism.”¹²

Constitutional conservatives were almost exclusively Democrats.¹³ The term as used in this dissertation is intended to not obscure political reality, but to focus upon the constitutional arguments they choose to make as their primary means of opposing conscription. In order to argue constitutional conservatives, including judges, were purely political actors, historians have often treated strict constructionism as a vehicle merely for protecting states’ rights for political purposes. Doing so effectively marginalizes their constitutional arguments by linking them to a word tainted by secession and nullification. Understood according to their own words, they were committed to the founders’ constitution and the antebellum federalism they believed conscription threatened. My purpose here is not to evaluate whether or not these actors correctly interpreted the Constitution. Nor is the goal of this dissertation to decipher the precise relationship between politics and constitutional arguments.

his peace rhetoric and focus on constitutional criticisms of the Republican war measures like conscription. *Ibid* at 141-42.

¹¹ *Ibid.*, 138. Thus, Seymour, in his January 1863 inaugural address, held that the war had to be fought with fidelity to state sovereignty and strict constitutional accountability, as “a consolidated government” would “destroy the essential home-rights and liberties of the people.”

¹² Jack Rakove, “Two Foxes in the Forest of History,” *Yale Journal of Law & Humanities*, Vol. 11, no. 1 (1999): 200.

¹³ As Chapter two suggests, there were some Republicans who were more conservative and fit a broad “constitutional conservative” label. A fitting example is Illinois’ Lyman Trumbell, one of the only Republicans to oppose parts of the Conscription Act and the only Republican to support James Bayard’s March 2nd attempt to indefinitely postpone passage and debate on the Conscription Act. Conservative Pennsylvania Republican Edgar Cowan likewise fit the label of a moderate constitutional conservative committed to the volunteer tradition and militia power who nevertheless supported national conscription.

This is precisely because the relationship between politics and constitutional arguments was not static, but in constant flux. Like the multiple loyalties David Potter discusses in addressing southern nationalism and Confederate citizens, Northern citizens who had shared values about the importance of upholding constitutional tradition and the founders' Constitution disagreed not only about interpretation, but varied in the degree to which their constitutional values weighed against their support for the war and sanctioning the power necessary to save the nation. Additionally, constitutional values represented aspirational ideals, as few political and legal actors could truly separate their constitutional positions from politics but believe they should make all efforts to do so. Finally, this dissertation shows that constitutional arguments were often crafted in political arenas—in Congress, political newspapers, and through partisan bodies—a reflection of the emotional resonance of these constitutional arguments, inextricably linked to northern Democratic resistance to Republican policies they believed shifted the war from one to save the Union and Constitution to an abolition war. Yet, over the course of 1863, constitutional conservatives also honed their core constitutional arguments in order to prepare successful judicial challenges to the Conscription Act.

Constitutional conservatives understood themselves as adhering strict constructionism as an interpretive approach for understanding the Constitution, going back to the Anti-Federalist and Jeffersonian traditions.¹⁴ However, in order to fully describe their interpretive approach, this dissertation will use the term “historical originalism” to describe the commitment to textual limitations on federal power, rejection of implied powers, and opposition to an evolving

¹⁴ Nolo Plain English Dictionary gives a fair definition for strict constructionism: “Interpreting a legal provision (usually a constitutional protection) narrowly. Strict constructionists often look only at the literal meaning of the words in question, or at their historical meaning at the time the law was written. Also referred to as “strict interpretation” or “original intent,” because a person who follows the doctrine of strict construction of the Constitution tries to ascertain the intent of the framers at the time the document was written by considering what the language they used meant at that time.” <https://www.nolo.com/dictionary/strict-construction-term.html>.

Constitution. Constitutional conservatives thus believed in narrowly interpreting the powers of the federal government and protecting the reserved powers of the states according to the original understanding of federalism.¹⁵ Conscription threatened to upend their constitutional values and required both political and legal action to halt it. While this dissertation focuses on the resurrecting the way constitutional conservatives opposed conscription with constitutional arguments, it also shows how constitutional nationalists spoke constitutionally as well. Republican newspapers, politicians, and lawyers took seriously the need to craft constitutional arguments in support of the Conscription Act and their efforts must also be understood as sincere.

Three terms are important for understanding this public constitutional debate are related but distinct. States' rights was the phrase most widely used by nineteenth-century actors. However, Republican critics of the Democratic opposition tended to use it as an invective against administration opponents. They felt those who supported states' rights likely also supported nullification, slavery, and immediate peace with the Confederacy. Historians have often mirrored the language and assumptions of Republicans. States' rights have come to mean a commitment to slavery under state law embodied by the Confederate Constitution. Federalism was less commonly used by constitutional conservatives, but the term avoids the pejorative nature of states' rights while embracing the commitment of strict constructions to the original constitutional structure. Federalism refers to the division of power under the Constitution between state and federal governments. As Timothy Zick argues, federalism indicates but does not *define* state sovereignty.¹⁶

¹⁵ Hereinafter, the understanding of federalism employed by constitutional conservatives will be referred to as "antebellum federalism."

¹⁶ Timothy Zick, "Are The States Sovereign?," *Washington University Law Review*, Vol. 83, no. 1 (2005): 29.

State sovereignty is a related but distinct constitutional principle. Sovereignty is an amorphous concept that continues to produce debate amongst scholars as to its precise meaning. This dissertation does not look to enter the debate over sovereignty. Rather, this dissertation only argues that constitutional conservatives also employed the language of state sovereignty as part of their arguments to sustain antebellum federalism. By state sovereignty, they meant the power states held within their own borders over internal governance including the military that the Conscription Act necessarily interfered with. Constitutional conservatives felt state sovereignty remained powerful enough under the Constitution that states maintained exclusive control over all powers of internal governance not otherwise explicitly granted to the federal government. They pointed to Hamilton's *Federalist* 32 which states governments "clearly retain all the rights of sovereignty which they before had, and which were not ... exclusively delegated to the United States."¹⁷ Constitutional conservatives aimed to protect the balance of power as originally constructed under the Founders' Constitution. As with federalism, understanding state sovereignty helps to unfurl the meaning of states' rights in the nineteenth-century.

Finally, the principle of separation of powers holds that the legislative, executive, and judicial departments be separate and distinct. As James Madison noted in *Federalist* 47, the principle was derived from the political maxim of Montesquieu which held, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers."¹⁸ Accumulation of legislative, executive, and judicial power in one body was a danger

¹⁷ Alexander Hamilton, "Federalist No. 32," http://avalon.law.yale.edu/18th_century/fed32.asp.

¹⁸ James Madison, "Federalist No. 47," http://avalon.law.yale.edu/18th_century/fed47.asp. See also James Madison, "Federalist No. 51," http://avalon.law.yale.edu/18th_century/fed51.asp ("In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.") Madison was also clear in Federalist 47-51 that he did not mean

to liberty and the definition of tyranny. This was a fundamental constitutional principle that constitutional conservatives believed must be upheld. They saw the Conscription Act as tyrannical in part because it ignored separation of powers in granting the President and executive officers legislative and judicial powers.

In defense of these principles, constitutional conservatives employed three constitutional arguments against conscription. First, they rejected the Conscription Act on federalist grounds, arguing that it unlawfully encroached upon state militia powers. Second, they attacked conscription for its interference with separation of powers, particularly the Boards of Enrollment as constituting an improper delegation of legislative power. Finally, they argued that conscription, like the suspension of *habeas corpus*, violated individual liberties. Historians have often anachronistically examined Civil War dissent with the expectation that the grounds of objection to conscription would begin with civil liberties violations. In contrast to these assumptions, constitutional conservatives emphasized maintaining antebellum federalism first and separation of powers and personal liberties arguments second. Constitutional conservatives drew heavily on constitutional tradition and history to support these arguments. As chapter two discusses, they not only looked to the founding, but the experience of the War of 1812 and the constitutional objections to Secretary of War James Monroe's attempt to pass national conscription.

As noted, supporters of conscription or constitutional nationalists-Republicans and War Democrats-made their own constitutional arguments in defense of the act. Constitutional nationalists were portrayed by constitutional conservatives as constitutional nationalists prepared to create a federal despotism, but they saw themselves as following from Hamiltonian principles

complete separation of powers, as some blending of powers would be necessary, but to protect against "overruling influence" and against the invasion of one department over another.

in upholding the residual powers of nation states to defend their existence. If constitutional conservatives believed they followed the Jeffersonian and later Jacksonian tradition, nationalists were affirmatively Hamiltonians. For them, constitutional history provided ample precedent for conscription and the incidental powers of national government needed to be sufficient to deal with a threat to the government's existence. However, given the uncertainty of any outcome before the Taney Court, the Lincoln Administration's strategy for dealing with constitutional controversies was to avoid the Supreme Court if possible. Supporting the war effort at all costs ultimately trumped constitutional concerns, even if Lincoln himself and cabinet members like Samuel Chase and Edward Bates took those arguments seriously. At the same time, the need to act pragmatically while attending at times to the relevant constitutional arguments suggests that the Lincoln administration was both unsure they would win such a case before the Supreme Court and concerned with proving the Conscription Act was on solid constitutional footing. This meant avoiding any state court decisions that decided upon pertinent constitutional questions which could be appealed to the Supreme Court.

Yet, privately, Lincoln took the matter seriously enough to sketch out his own constitutional arguments in support of the Conscription Act. In late 1863—possibly in response to the *Kneedler* decision in Pennsylvania—he prepared an opinion on the draft law never issued or published while he was alive.¹⁹ Lincoln reasoned that the power of Congress to conscript was expressly given and this was the first time a power of Congress was questioned in a case “when

¹⁹ See Mark E. Neely, *Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford: Oxford University Press, 1991), 248 fn55 (Neely observes that John G. Nicolay and John Hay, in their 1890 history of Lincoln, dated the draft opinion to August 1863, but Neely argues that rather than coming in the aftermath of the draft riots it seems “even more likely to have been provoked later” after the Pennsylvania Supreme Court's decision in *Kneedler v. Lane*); John G. Nicolay & John Hay, *Abraham Lincoln: A History*, IV (New York: Century, 1890).

the power is given by the Constitution in express terms.”²⁰ Lincoln saw this as the first case to deny power which was “plainly and distinctly written down in the Constitution,” pointing to the power to “raise and support” armies. This, he thought, was the “whole of it.”²¹ Lincoln, like many Republicans, felt it was apparent that the law was constitutional because Congress had its choice of means in prosecuting the war. The Constitution did not determine or prescribe the mode for raising armies but gave it “fully, completely, unconditionally.” Constitutional nationalists, including Lincoln, were as invested as constitutional conservatives in proving their positions harmonized with the founders’ constitution. Before lawyers could contemplate constitutional arguments and legal strategies in the fight over conscription, these arguments were first tested and constructed through the debate in Congress.

When considering the constitutional debate over conscription in 1863, the fact that congressional speeches were political tools meant to be shared with public and not necessarily connected to the process of making the laws themselves speaks to their value within the public constitutional debates. The meandering polemics given by constitutional conservatives against the Conscription Act in February 1863 were intended not just to flesh out the constitutional objections to the bill, but to do so with the hope of spreading those objections widely to the people. As Rachel Sheldon notes, in the antebellum period, senators and representatives generally attended to the needs of their constituents by making congressional speeches.²² Sheldon rightly observes the limitations of the *Congressional Globe*, which offered the only

²⁰ William E. Gienapp, *Abraham Lincoln and Civil War America: A Biography* (New York: Oxford University Press, 2002), 117. As William Gienapp attests, Lincoln wrote this argument in a letter to a paper in late 1863 he never sent, reflecting that he was on “shakier ground” and “perhaps” believed the letter was “inadequate.”

²¹ James G. Randall, *Lincoln The President*, (New York: De Capo Press, 1946), 298.

²² Rachel Sheldon, *Washington Brotherhood: Politics, Social Life and the Coming of the Civil War* (Chapel Hill: University of North Carolina Press, 2013), 3 She notes that like nineteenth-century partisan newspapers, the *Congressional Globe* records are a “critical tool” in researching political history that must be met with a critical eye for the underlying partisan motivations.

“official record” of political negotiation versus what happened behind the scenes.²³ The *Globe*, along with the *National Intelligencer*, were reprinted in newspapers around the country and the nation's main access to Congress, but both papers were selective in their coverage, as leading speeches were included with lesser attempts left out and abstracts of debate were patchy and focused on proceedings.²⁴

Significantly, congressmen were allowed to edit, remove, or substantially add to speeches given in Congress when they were preparing them for publication in newspapers or pamphlets.²⁵ Yet, congressmen did this in response to public interest and demand. As Joanne Freeman states, in the antebellum period, "Congress was where the action was" and got the "lion's share of column inches," as newspapers routinely printed lengthy summaries of congressional debates and commentary.²⁶ While congressional speeches may have been designed mostly for partisan purposes and to reach constituents, if the content of those speeches were principally about the constitutional defects of the Conscription Act, it reflects that these concerns were relevant to the public. This dissertation does not aim to argue about reception of these arguments by the public, but rather the choices made by elite voices whom felt constitutional arguments were central to the objections to the Conscription Act they shared publicly with their constituents.

Once the Conscription Act was signed into law on March 3, 1863, public debate over the constitutionality of conscription quickly emerged. New York and Pennsylvania were particular

²³ *Ibid.*, 202, fn. 3.

²⁴ Joanne B. Freeman, *The Field of Blood: Violence in Congress and the Road to Civil War* (New York: Farrar, Straus, and Giroux, 2018), 186-87. Ideologically, the *Globe* was founded as a Democratic paper by Francis Preston Blair and John Cook Rivers in 1821.

²⁵ Shelden, *Washington Brotherhood*, at 30-31. Sometimes misunderstandings were handled by making a “personal explanation” on the floor of the House or Senate to “clarify” a previous speech to ensure they did not mean to cause offense to fellow Congressmen, an extremely common practice at the time. *See also* Freeman, *The Field of Blood*, at 190. Congressmen devoted “long, hard hours to their press coverage,” as even the great Daniel Webster “routinely primed the press, outlining speeches in advance for reporters” and they had a “compulsive concern with press reports of their speeches” because their reputations depended on it.

²⁶ Freeman, *The Field of Blood*, 27.

hotbeds of those constitutional battles. It was in these two states that the most significant judicial actions occurred, with both also home to an explosion of commentary about conscription in the newspapers and pamphlets. Certainly, opposition to the war and resistance to the conscription itself was widespread in the north, particularly in the Midwest. And Democratic papers from Wisconsin to Chicago to Connecticut to Cincinnati to Detroit to Maine published constitutional arguments against the Conscription Act. Connecticut's Democratic gubernatorial candidate Thomas Seymour openly opposed conscription, while states like New Jersey and Connecticut reacted early with resolutions from Democrats opposing the constitutionality of conscription.²⁷ New Jersey's House of Representatives even passed resolutions of March 17, by vote of 38 to 13, stating that the people of the state felt the war powers "within the limits of the Constitution," were "ample for any and all emergencies" and all assumptions of power beyond the Constitution's grant were without "warrant or authority" and it permitted to continued would "encompass the destruction of the liberties of the people and the death of the republic."²⁸ However, no other states had comparable amounts of judicial action in combination with ongoing, robust public constitutional debate. It appeared possible for a moment in the summer of 1863 New York courts might overturned the Conscription Act, while the Supreme Court of Pennsylvania would in fact do so in November.

²⁷ The February 1863 Hartford Convention platform essentially followed the 1814 Hartford Convention in its resolutions. It argued that the conscription bill introduced in the Senate was "unconstitutional in its provisions" and "dangerous" to liberty and state authority should resist such a scheme. The resolutions spoke to the "intolerable burden" placed upon the people by a bill that not only violated the rights of the states and sovereign people which was unconstitutional in its provisions, but it was also "unequal, unjust, and tyrannical." "The Question Before Us," *Hartford Daily Courant*, March 21, 1863, 2.

²⁸ "New Jersey Legislature: The 'Peace' Resolutions as Passed by the House. Protest," *New York Times*, March 20, 1863, 2. The New Jersey House also protest war for "unconstitutional" or "partisan" purposes, objected to the Emancipation Proclamation, and proclaimed fidelity to enumerated powers doctrine by stating they were, "Against any and every exercise of power upon the part of the Federal Government that is not clearly given and expressed in the Federal Constitution." *Ibid*.

As Iver Bernstein observed in his landmark study of the New York City draft riots, the Conscription Act highlighted explosive issues in mid-century New York City, namely class issues, racial issues, and the divide between the national government and state and local governments.²⁹ The historiography tends to pay more attention to the draft riots than other forms of opposition to conscription, namely constitutional resistance. Thus, this dissertation will not examine the draft riots themselves, which were not acts explicitly connected to any constitutional arguments. Rather, this study focuses on the responses to the riots in the press and the battles in New York courtrooms. Governor Horatio Seymour and other New York Democrats saw the Conscription Act as unconstitutional subordinating state and local authority and believed that the courts were the proper venue for redress. Over the course of 1863, New York courts saw numerous challenges to conscription, but constitutional conservatives only managed one victory before being bogged down in arguments over jurisdiction. Simultaneously, the city's partisan newspapers battled over the course of the year over the act's constitutionality. According to Stephen Engle, New York City was a loyal city that nevertheless became the "nation's" battleground over conscription."³⁰

Like New York, Pennsylvania saw plentiful popular resistance to conscription, especially in the anthracite mining regions in the north.³¹ Philadelphia Democrats, led by a cadre of experienced lawyers and aristocratic politicians, became the principal leaders of the fight against

²⁹ Iver Bernstein, *The New York City Draft Riots: Their Significance for American Society and Politics in the Age of the Civil War* (Oxford: Oxford University Press, 1990), 8-9. The Conscription Act was not easily tolerated because it seemed a "naked exercise in class power" and before the draft was enforced in the spring and early summer of 1863, factory owners and political machines mobilized to aid conscripts.

³⁰ Stephen Engle, *Gathering to Save a Nation: Lincoln and the Union's War Governors* (Chapel Hill: University of North Carolina Press, 2016), 316-17.

³¹ See Grace Palladino, *Another Civil War: Labor, Capital, and the State in the Anthracite Regions of Pennsylvania, 1840-1868* (New York: Fordham University Press, 1990), 95-120. "In states like Pennsylvania, where conservative Democrats wielded significant influence, the idea of conscription threatened long-cherished notions of popular sovereignty and personal autonomy that even war had not displaced."

conscription. Four in particular-Charles Ingersoll, George Biddle, George Wharton, and Peter McCall-helped bring a case claiming the Conscription Act was unconstitutional before the Pennsylvania Supreme Court in the fall of 1863. By November, in the case of *Kneedler v. Lane* they achieved the most significant victory for constitutional conservatives when the Pennsylvania Supreme Court on a 3-2 margin declared the act unconstitutional. Within just over two months, their judicial victory would be reversed, the consequence of an electoral loss for the Democrats. Constitutional conservatives in Pennsylvania failed to get the state federal courts to overturn conscription, but they had enough success getting citizens released by writs of *habeas corpus* to frustrate Lincoln himself.³²

The focus of this dissertation is on the public constitutional debate and cases involving conscription in the north in 1863. Although the perspective of constitutional conservatives on abolitionism and emancipation is discussed, this dissertation does not aim to evaluate the connection between race and constitutional arguments. There is no question that constitutional conservatives partly criticized the Republican war measures for aiming to support an abolitionist war, not a war for restoring the Union and the Constitution as it was. They also criticized the Conscription Act for forcing white soldiers to serve alongside black soldiers. Constitutional conservatives were undoubtedly racist and often openly stated their support for the continued protection of slavery alongside their cries for the maintenance of the Union and Constitution as it was. Yet, few, if any, of their federalism-based constitutional arguments were explicitly linked to the racial arguments. The most obvious exemption is that the tradition of a volunteer militia system inherently meant a white-only system. Further, many believed that volunteerism would

³² Habeas Corpus means “to present the body.” Going back to English Common Law and the Magna Carta, the writ was used to challenge the basis for imprisonment and came to be viewed as a fundamental right under the English Constitution.

have remained sufficient to fight the war if the administration had never converted the war's aims from one to restore the Union as it was to an abolition war. Thus, Republican war measures were problematic both because they were unconstitutional and because they were made necessary by the *abolition* war.

This dissertation focuses on the history of constitutional ideas and is not a history of politics. By making the argument that constitutional ideals and arguments can be held separately from political beliefs, this dissertation is about rhetoric over action. Yet, as noted, the relationship between politics and constitutional arguments was in constant flux. That constitutional values and principles could override and come before political obligations and partisanship does not mean this was always or usually the case. The constitutional debate involved actors on both sides of the issue wavering between constitutional commitments and partisan battles. The public constitutional debate over conscription and other war issues was limited to elite, educated white men. Women certainly were among those resisting conscription and undoubtedly influenced the filing of *habeas* petitions on behalf of their children and even a handful of women brought suits themselves.³³ But they were limited in the roles they could play in the courtroom, unable to practice law, and thus were not among the class of lawyers, politicians, and newspaper editors debating conscription. Likewise, African-Americans were purposefully banned from participating in the public constitutional debates and there is unfortunately little history covering the reactions of African-Americans to the Civil War draft.

This dissertation also does not deal extensively with the problem of loyalty. Certainly, loyalty colored the constitutional debates over conscription just as race did. Republicans and War

³³ See *In Re Holmes*, September 1, 1863 (E.D. Pa. 1863) Judge Cadwalader granted writ in a suit brought by Ann Huerst on behalf of her son William claiming he was taken into "unlawful custody and control" and had enlisted without "knowledge of consent."

Democrats in particular frequently scolded constitutional conservatives and brandished them as potential traitors and southern sympathizers for having the temerity to question the constitutional footing of conscription. For constitutional nationalists and supporters of conscription, constitutional arguments and personal loyalty were connected. Because they desired to secure the state and the nation, they were wary about constitutional objections which were powerful enough to dislodge policies they believed were necessary to win the war. Constitutional conservatives tried to make clear that their criticism had nothing to do with southern sympathy or attempts to end or frustrate the war effort outside of ensuring the war remained one fought for Union and the Constitution as it was. Yet, arguments about loyalty were not ultimately about the Constitution, instead reflecting how many Americans valued the security of the nation over their constitutional values in the midst of the Civil War. Studies of loyalty during the Civil War are properly their own subset of Civil War history. Even dealing with the question of loyalty and draft resisters have produced several notable studies.³⁴ Thus, it falls outside the limits of this dissertation, which aims to understand constitutional arguments not questions of personal loyalty.

Historiographical Review

³⁴ Robert M. Sandow, ed., *Contested Loyalty: Debates over Patriotism in the Civil War North* (New York: Fordham University Press, 2018) using letters, diaries, and print culture to show Northerners spoke frequently about loyalty; Robert Sandow, *Deserter Country: Civil War Opposition in the Pennsylvania Appalachians* (New York: Fordham University Press, 2009), 61-98 discussing the “rhetoric of loyalty”-for instance, the use of “Copperhead” as profanity meant to impugn the character and integrity of Democrats-and the “intensified public debate” over loyalty politicized previously nonpartisan rituals and life activities and that Democrats had to justify political opposition as not betraying the nation, singling out the draft as having “tremendous symbolic potential” in the rhetoric of loyalty; William A. Blair, *With Malice for Some: Treason and Loyalty in the Civil War Era* (Chapel Hill: University of North Carolina Press, 2014), 167-68 arguing because Democratic enclaves that manifested early expressions of partisanship “provided fertile ground for preaching against mobilization,” they became targets for federal agents suppressing domestic traitors; Frank L. Klement, *The Copperheads in the Midwest* (Chicago: University of Chicago Press, 1960); Jennifer L. Weber, *Copperheads: The Rise and Fall of Lincoln’s Opponents in the North* (Oxford: Oxford University Press, 2008); Melinda Lawson, *Patriot Fires: Forging a New American Nationalism in the Civil War North* (Lawrence: University of Kansas Press, 2002), 71 noting that, “In these battles for control of state governments and the direction of the war, the partisan definition of loyalty became a major weapon.....wartime Americans were told that unquestioning support for the Republican Party was the mark of patriotic dedication to the nation”.

The historiography of the Civil War draft has largely ignored constitutional opposition to conscription. Most historians who covered the draft looked to explain the mechanics and effectiveness of the draft, not its constitutionality. Even studies of resistance to the draft tend to marginalize constitutional arguments, as social historians focused on the actions and discontent of groups. The handful of constitutional histories about the north tend to spend little time on constitutional arguments resisting conscription, focusing on the growth of the nation and challenges to other policies like the suspension of habeas corpus and Lincoln's blockade. Only Mark Neely has specifically addressed at length the New York and Pennsylvania conscription cases in a single monograph. This dissertation aims to understand the constitutional arguments of both constitutional conservatives and constitutional nationalists on their own terms. In doing so, it disputes both Neely's interpretation of the conscription cases and debates and the marginalization of constitutional arguments in the historiography.

Constitutional history of the Civil War starts with the work of James Randall, who wrote the bedrock of Civil War constitutional history in 1926, *Constitutional Problems Under Lincoln*.³⁵ Randall interpreted the judicial cases on issues of federal power like conscription as reflecting the presumption among legal and political actors in favor of strong national power. He argued that constitutional arguments against conscription were prompted by the desire to save drafted men from punishment for desertion. For Randall, opponents of conscription usually utilized the "state-rights", strict-constructionist" arguments that centered on the distinction between the militia and the army by arguing the militia was a state institution.³⁶ He rightly

³⁵ James G. Randall, *Constitutional Problems Under Lincoln* (New York: D. Appleton and Company, 1926).

³⁶ *Ibid.*, 271. Thus, Congress was limited in calling out the militia and providing for its discipline when in "actual service." The Conscription Act was unconstitutional because it interfered with state power by grabbing state militiamen and officers under the draft.

identified that they employed constitutional tradition to argue the founding fathers had not contemplated such sweeping powers as conscription and had limited Congress to reliance on voluntary enlistments to ensure that wars had the check of the people's consent.³⁷ However, Randall, writing in the wake of World War I and the Supreme Court's unanimous approval of conscription in *Arver v. United States*, denied the accuracy of these constitutional arguments, making normative claims that the powers to "declare war" and "raise armies" were without qualification.³⁸ Since Randall's work, historians have tended towards a Lincoln-centric, nationalist model of interpretation.

Following Randall's seminal work, between his 1935 biography of Roger Taney and his 1974 posthumous Oxford history of the Taney Court, legal historian Carl Brent Swisher detailed overview of constitutional cases during the Civil War period including the conscription cases. As Mark Neely notes, Swisher's work is sobering because it reminds readers that the Supreme Court spent most of the war reviewing issues related to land titles in California.³⁹ Swisher wrote that conscription ran "counter to prevailing beliefs in American liberty" and "carried a stigma in that it implied a lack of courage and willingness to fight."⁴⁰ Because it flouted American

³⁷ *Ibid.* Randall noted too that opponents of conscription believed the framers worried if Congress had conscription power, it could raise troops by compulsion in peacetime, a power "wholly inconsistent" with the founding generation's concern for standing armies.

³⁸ *Ibid.*, 271-72. Randall stated that national power was upheld by a "strong preponderance of judicial opinion" in the face of these objections during the Civil War. Randall argued the founders had in fact corrected the mistakes of the Articles of Confederation, which allowed Congress to declare war but only to request troops from States, with an independent, unlimited power to "raise armies." The army and militia were separate and distinct, with Congress having authority over the militia superior to the power of states over their militias. These powers conflicted in times of emergencies and state power had to give way. *Ibid.*, 272. To Randall, the power to conscript must "lie somewhere" and it could only lie with the Federal government which had the power of war and raising armies.

³⁹ Mark E. Neely, *Lincoln and the Triumph of Nation: Constitutional Conflict in the American Civil War* (Chapel Hill: University of North Carolina Press, 2011), 166. In his earlier 1943 work, *American Constitutional Development*, Swisher confirms that a measure of compulsory military service had never been resorted to before 1863, although it was nearly passed during the War of 1812.

⁴⁰ Carl B. Swisher, *American Constitutional Development* (Riverside: Oxford University Press, 1943), 293. Conscription "had been opposed as contrary to the principles of liberty embodied in our political institutions" as well as the belief "firmly ingrained that conscripts were poor soldiers in comparison with volunteers."

constitutional tradition, he argued that in the minds of “legalistically trained persons, these objections were rationalized into constitutional or other legal objections.”⁴¹ Swisher correctly summarizes that constitutional objections to conscription as centering on the argument that the power to raise and support armies extended only to raising armies of volunteers and calling into federal service the militia of the several states. Swisher notes that the question of the constitutionality of the act never reached the Supreme Court, but some state courts and lower federal courts did answer it without “eliciting (an) definitive answer.”⁴² He rightfully understood understand the constitutional battles over conscription as not definitively supporting the constitutionality of the act and to recognize the heightened role of state courts. Still, Swisher’s synthesis of the Taney Period necessarily was limited in its treatment of the Civil War conscription cases given the Supreme Court’s absence.

Interest in the constitutional history of the period faded for decades until legal history saw a broad revitalization starting in the late 1960s and 1970s. Yet, by the 1970s, Randall’s nationalism thesis remained strong.⁴³ In Harold Hyman’s 1973 work *A More Imperfect Nation*, he wrote that Lincoln’s vision of the constitution triumphed over the view of Chief Justice Taney and dissenting Democrats. Hyman argued the country shared Lincoln’s pragmatism concerning the constitution and the needs of the war effort and accepted his “adequacy” thesis, which suggested the Constitution’s principal concerns were the maintaining the government and protecting the general welfare instead of merely protecting individual rights.⁴⁴ In 1982, Hyman

⁴¹ Carl B. Swisher, *The Taney Period, 1836-1864* (Oxford: Oxford University Press, 1971), 947.

⁴² *Ibid.*, 295.

⁴³ Daniel Farber’s 2003 work, *Lincoln’s Constitution*, also continues this tradition. Daniel Farber, *Lincoln’s Constitution* (Chicago: The University of Chicago Press, 2003) Farber sees Lincoln’s constitutional views and Civil War constitutionalism generally show the constitution as an exercise in nation-building wherein actions of military expansion generally did not offend the constitution.

⁴⁴ Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution*, (Boston: Houghton Mifflin Company, 1973), 216-223.

gave greater consideration to individual cases when he teamed with legal historian William Wiecek to produce a synthesis of constitutional development between 1835 and 1875.

Hyman and Wiecek rightly understood that the Lincoln administration engaged in a strategy of avoidance on constitutional questions. They observed how Lincoln “tried to keep off the Court’s docket other litigation involving habeas corpus, treason, martial law, conscription, emancipation, or the novel wartime income tax” because they feared its effect on the nation’s war capacity.⁴⁵ Hyman and Wiecek believed Lincoln was wise to pursue avoidance, given that Chief Justice Taney had prepared opinions privately that declared arbitrary arrests, emancipation, and conscription unconstitutional.⁴⁶ They also took a dim view of the constitutional arguments of Democrats, seeing them as merely retaining “concepts of liberties only in the traditional context of fixed constraints on wrongs that the government must not commit” and constraints that operated to limit national power at all times.⁴⁷ Significantly, Hyman and Wiecek understood the Pennsylvania Supreme Court’s decision in *Kneedler v. Lane* to be the result of Democratic judges acting in a “highly politicized situation” to declare conscription unconstitutional before reversing itself.⁴⁸ Thus, rather than address the particular constitutional arguments or why they choose them, Hyman and Wiecek discarded appeals based on constitutional conservatism as sheer partisanship. They celebrated the pragmatism of Lincoln’s constitutionalism over what they saw as stagnate opposition.

⁴⁵ Harold M. Hyman & William M. Wiecek, *Equal Justice Under Law: Constitutional Development 1835-1875*, (New York: Harper & Row, Publishers, 1982) 240-41.

⁴⁶ Without being able to address the major policies like conscription, Taney attacked minor actions like the Treasury Department’s policies licensing trade south of the Potomac as destroying federalism and separation of powers. Taney was the one Supreme Court justice to speak openly about the unconstitutionality of the Lincoln administration’s actions.

⁴⁷ *Ibid.*, 249.

⁴⁸ *Ibid.*, 256. And while other state courts granted *habeas* writs to drafted individuals and especially minors, no constitutional test resulted from these instances before war’s end.

Not all historians have taken such a cynical view of the Democratic opposition and their constitutional arguments. The resurrection of the Democrats as a loyal opposition with serious arguments came with Joel Silbey's 1977 work, *A Respectable Minority*. In it, Silbey sought to understand what he deemed "constitutional conservatives" at the center of the respectable minority party who were committed to constitutionalism. These Democrats held certain "deeply ingrained Democratic beliefs about limited government, the Constitution, and conservative social policy."⁴⁹ In particular, Silbey thought conscription intensified Democratic anger since it was both contrary to the "genius and principles of republican government" and "foreign to the American experience, destructive of American liberties, and part of a larger and unacceptable commitment to state control over individuals and their behavior."⁵⁰ Two related and traditional themes structured all Democratic arguments—a limited-powers constitutionalism based in Jacksonian politics alongside fear of social revolution.⁵¹

Silbey's work divides Democrats into competing camps, with the "extreme peace Democrats" or purists in one group, including figures like Ohio Representatives Clement Vallandigham and George Pendleton, Connecticut Governor Thomas Seymour, and New York Mayor Fernando Wood, "legitimists" or moderate Peace Democrats like Ohio Representative Samuel S. Cox and New York Representative David Turpie in a second group and War Democrats in a third.⁵² The legitimists looked to emphasize points of agreement among

⁴⁹ Joel H. Silbey, *A Respectable Minority: The Democratic Party in the Civil War Era, 1860-1868* (New York: W.W. Norton & Co., 1977), 106, 117-18, 192, 245. Silbey refers to these beliefs as "primitive constitutionalism."

⁵⁰ *Ibid.*, 73. Nineteenth century Democrats regarded political authority and individual liberty as "natural antagonists" and saw the struggle to overcome tyranny as necessarily "unrelenting."

⁵¹ *Ibid.*, 72, 87 (Democratic traditionalism in the both belief and rhetoric was the "most dominant aspect of their response to the war," according to Silbey, and it gave them common symbols and ideas to unify them).

⁵² *Ibid.*, 92. William Gienapp also suggests there were three major Democratic factions during the war. These were the War Democrats, who supported Lincoln's call for suspension of partisanship during the war, the "Regular Democrats" were the largest wing who support war to save the Union but not emancipation or suspension of civil liberties and the last group was the "peace Democrats" or "Copperheads." By being noisy and attracting

constitutional conservatives who felt that Lincoln's policies hurt the war effort and made peace "all but impossible."⁵³ They wished in Congress to establish a clear record of war support and reaffirmation of the Union while maintaining their opposition to the administration. As the *New York World* wrote, these Democrats discriminated between the "constitutional and unconstitutional measures of the administration, zealously supporting the former and vigorously repudiating the latter."⁵⁴ "Purists" were reflexively anti-war and in fighting to preserve the Constitution, "they bitterly attacked, as did their Legitimist brethren, the centralization of power, abolitionism, and the Republican party."⁵⁵

Silbey also shows the vital role of newspapers in spreading party platforms, including their constitutional arguments. The role of the widespread, vigorous Democratic press during the Civil War in major urban centers and state capitals throughout the North was to remind the "faithful" voters through editorials and news stories of "their past commitments, exhorting them to turn out on election day, and reestablishing in every Democratic mind the negative images of the opposition."⁵⁶ New York papers were at the center of this machine. By 1863, the *New York World* had become the "leading national organ of the party" and was the center of a "functioning Democratic machine."⁵⁷ Even if it was doubtful the formal arguments of their platforms and

attention, Copperheads "tarred" the Democratic Party with the image of disloyalty. Gienapp, *Abraham Lincoln*, 117. Phillip Shaw Paludan likewise notes that legitimists shared the conservative constitutional and social philosophy of purists but recognized that "ideological purity required the ballast of realism if ideals were to be executed by an elected administration." Phillip Shaw Paludan, *A People's Contest: The Union and Civil War: 1861-1865* (New York: Harper's Row & Co., 1988), 247.

⁵³ Silbey, *A Respectable Minority*, 95.

⁵⁴ *Ibid.*, 97. (*New York World*, February 17, 1864)

⁵⁵ *Ibid.*, 101-02 Legitimists "deceived themselves" by believing they could support the war and preserve the Constitution. As former New York Mayor Fernando Wood said, there could be "no such thing as a War Democrat, because when a man is in favor of the war, he must be in favor of the policies of the war as it is prosecuted by the party in power, with its unavoidable tendency to destroy the Constitution and the Union."

⁵⁶ *Ibid.*, 65.

⁵⁷ According to Joanne Freeman, by the 1850s, New York City editors gained prominence over Washington as the major sources of congressional news coverage and became power brokers who could "make or break Congressional careers." Freeman, *The Field of Blood*, 184. The *World* was edited by Manton Marble in the 1860s, a moderate, hard-money "Swallowtale" Democrat. Erik B. Alexander, "The Fate of Northern Democrats after

literature would be “read all the way through or clearly understood by all readers,” they provided guides for most to understand what was being argued as well as symbols to reduce complex policy matters and the use of negative imagery. Speeches, pamphlets, and newspaper editorials did the work of repeating and clarifying the desired signals of the parties.⁵⁸ Broadly, these were conversations about war policy itself and the public debate over conscription mirrored that of loyalty through the work of Democratic politicians and newspaper editors. This dissertation aims to build on Silbey’s work in understanding the rhetoric of constitutional conservatives, including their constitutional opposition to conscription, and the role of partisan newspapers.

Historians have recently revisited Silbey’s interpretation. William Harris’s 2017 monograph, *Two Against Lincoln*, paints Maryland Senator Reverdy Johnson and New York Governor Horatio Seymour as leaders of a constitutional conservative loyal opposition during the war.⁵⁹ Harris correctly observes that historians have often understood Democrats during the Civil War by contrasting war and peace Democrats. He argues that frequently neglected in accounts of Civil War Democrats are those who “remained faithful to the old party of Andrew Jackson” and its constitutional tenets, supported the war but opposed Lincoln and the Republican.⁶⁰ Harris calls these Democrats “loyal Democrats,” viewing Seymour as their leader. They articulated constitutional and political principles for constitutional conservatives and Democrats in

the Civil War: Another Look at the Presidential Election of 1868,” in, in *A Political Nation: New Directions in Mid-Nineteenth Century Political History*, ed. Gary W. Gallagher & Rachel Sheldon (Charlottesville: University of Virginia Press, 2012), 193.

⁵⁸ Silbey, *A Respectable Minority*, 71. Jonathan White agrees that despite the party biases inherent in local newspapers, it is “important to realize the way local party leaders and newspaper editors helped structure public debate over loyalty through their speeches, editorials, and resolutions.” Jonathan W. White. *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* (Baton Rouge: Louisiana State University Press, 2011), 79. White notes that partisan politics were the dominant influence on public dialogue and party newspapers maintained the issues “at a fever pitch” by giving citizens the arguments that “emanated in waves through daily interaction.”

⁵⁹ Seymour continued to be a leader for constitutional conservatives and Democrats nationally, as he would be the Democratic nominee for President in 1868 alongside Ohio Democratic Congressman George Pendleton, running on opposition to radical reconstruction.

⁶⁰ Harris, *Two Against Lincoln*, 2.

speeches, pamphlets and letters and saw Republican policies as a serious threat to civil liberties and the “federal system of government created by the Founders.”⁶¹ As this dissertation argues, loyal Democrats felt a need to uphold antebellum federalism. This conservative opposition was distinct from Copperheads because it provided a serious challenge to the Republicans and their war policies. As opposition, loyal Democrats emphasized the original Union purpose of the war and reminded Americans “that constitutional principles should not be sacrificed.”⁶² This dissertation employs the foundations provided by Silbey and Harris’ work in establishing the significance of constitutional conservatives who followed Jacksonian strict constructionism.

Outside of works of political history and general constitutional histories of the Civil War and those focused on Abraham Lincoln, the historiography is relatively devoid of scholarship focused on constitutional arguments. Undoubtedly, no modern historian has analyzed the Civil War’s constitutional history as much as Mark Neely. In his most recent work, *Lincoln and the Democrats*, Neely gives his most complete assessment of the Democratic opposition to the Lincoln Administration’s war measures, including conscription. Neely rightly notes that we “simply do not understand the Democrats, study them enough, or make much of an attempt to see the Civil War through their eyes.”⁶³ Yet, Neely could admonish himself along the same lines, as he fails to take seriously the ongoing public constitutional debate over conscription. He openly

⁶¹ *Ibid.* The line between constitutional conservatives and Copperheads or Peace Democrats has not always been clear or recognized. Historians have often lumped constitutional opposition to Republican war measures together with the aims of Peace Democrats to end the war thus trivializing constitutional conservative arguments. For instance, historian Joanna Cowden contends, Peace Democrats tried to extend the wartime debate by pressuring supporters to defend the conduct of the war. Peace Democrats shouted “prophecies of doom,” saw Lincoln as a “despot striving to transform the nation into one that the founding fathers would not recognize,” and their “grip on tradition, particularly their stubborn insistence that the old loosely confederated republic be maintained, was tighter than mainstream Democrats.” Joanna D. Cowden, *Heaven Will Frown on Such a Cause As This: Six Democrats Who Opposed Lincoln’s War*, (New York: University Press of America, 2001) 9-17.

⁶² Harris, *Two Against Lincoln*, 16.

⁶³ Mark E. Neely Jr., *Lincoln and the Democrats: The Politics of Opposition in the Civil War* (Cambridge: Cambridge University Press, 2017), 85.

questions the sincerity of constitutional conservative objections to conscription. Finally, Neely's work fits alongside the Randall school that sees the constitutional history of the Civil War as a victory for nationalism and pragmatism.⁶⁴

Neely's core argument is that constitutional history during the nineteenth-century was a subset of political history. He believes constitutional arguments and action were mere politics. Thus, Neely sees Civil War Democrats as not particularly attached to conservative constitutionalism, but rather prone to the "irresponsible behavior endemic" to the American two-party system in which wars "generally send the opposition political party into a desperate search for constitutional issues."⁶⁵ Neely has support, as in a recent essay, Jennifer Weber briefly examines the *Kneedler* case as partisan judicial decision-making because it broke down upon party lines, as the opponents of conscription were "not without allies especially within the judicial system" and that circumstances surrounding the case were "highly political."⁶⁶ Neely argues that this was a transition, as Democrats "surrendered their central constitutional principle and floundered from careful dissent in 1862 into desperate pseudo-constitutional posturing by

⁶⁴ Overall, for Neely, nationalism was victorious in the courts in these cases as judges never affirmed family values but only considered power-whether the judiciary had power to remove the person in question from the control of the military. Neely, *Lincoln and the Triumph of the Nation*, 164.

⁶⁵ Neely, *Lincoln and the Democrats*, at 170. Previous scholars have made similar arguments. Herman Belz argued that the assertion of states' rights was a "default strategy adopted by the electoral minority, reflecting an attitude of opportunistic and loyal opposition." Herman Belz, "Lincoln, Secession, and Revolution: The Civil War Challenge to the Founding," in *Constitutionalism in the Approach and Aftermath of the Civil War*, ed. Paul D. Moreno & Johnathan O'Neill, ed. (New York: Fordham University Press, 2013), 92.

⁶⁶ Jennifer L. Weber, "Conscription and the Consolidation of Federal Power during the Civil War," in *Civil War Congress and the Creation of Modern America: A Revolution on the Home Front*, ed. Paul Finkleman & Donald R. Kennon (Athens: Ohio University Press, 2018) 25-26. Weber does understand that the Conscription Act meant a "tectonic shift" in the relationship between the state and federal governments. However, she generally believes that Democrats objected to conscription because it fit their pattern of claiming Lincoln's major war policies were unconstitutional and because it was a policy more likely to touch them personally. Weber's evidence is that two members of the majority, Chief Justice Lowrie and Justice Woodward, were in the middle of election campaigns when the case was heard, and that the federal government refused to participate in arguments. As discussed in Chapter 5 and 6, Lowrie was not a strongly partisan figure and Woodward acted conservative throughout his campaign, refusing to discuss the case and speaking mostly through intermediaries.

1864.”⁶⁷ He admits that not every Democrat gave up on those old principles during the war, saying that as late as the middle of 1863, the *New York World* was “willing to fire off one more volley on behalf of the principles,” decrying how an assertion of the doctrine of state sovereignty could be regarded as remarkable when it was the cornerstone of the Democratic faith.⁶⁸

Several issues arise in Neely’s analysis which this dissertation will help rectify. First, Neely presumes that the Democrats or any opposition party *search* for constitutional issues rather than discover them and form constitutional arguments as part of a legal and political strategy. This fails to recognize the novel constitutional questions brought on by Lincoln’s war policies. Federal conscription, like the broad suspension of *habeas corpus* and the income tax, were bold assertions of federal power beyond prior precedent. Precedent existed going back to the Revolutionary War for state militia drafts, but not for the nationalized versions seen during the Civil War.⁶⁹ Additionally, if constitutional conservatives were simply “looking around” for constitutional issues, given that they complained about the suspension of *habeas*, the income tax, the Legal Tender Act, and the Indemnity Act, that does not explain why their constitutional arguments and judicial actions primarily focused on conscription in 1863.⁷⁰ Conscription was an

⁶⁷Neely, *Lincoln and the Democrats*, 144.

⁶⁸ *Ibid.*, 144. Neely says none of twenty-three Democratic newspapers surveyed about secession expressed belief in the legality or propriety of secession and only “extremists” clung to the principles of ‘98 at the end of the war. But, in his 2011 work, *Lincoln and the Triumph of Nation*, Neely argues that Democratic arguments were comparable to nullification. As he argues, “the idea of interposing state rights against federal power was growing in appeal among New York Democrats” with the *New York World* expressing the desire to see the governor “interpose the arm and shield of the State of New York between Mr. Lincoln & the oppressed within” the state.” Mark Neely, *Lincoln and the Triumph of Nation*, 174-75.

⁶⁹ As Chapter 2 discusses, Secretary of War James Monroe did craft a bill for national conscription during the War of 1812, which was debated in Congress with significant opposition, but the war ended before a final vote was made.

⁷⁰ It is important to note here that both the Legal Tender Act and the Indemnity Act were legally challenged in state courts. In 1865, Judge Barnard, a Democrat, of the New York Supreme Court struck down Section IV of the Habeas Corpus Act of 1863-the removal provision-as unconstitutional. *Benjamin v. Murray*, 28 How. Pr. 193 (1865) “The President, before this act had no power of irresponsible arrest at his will, and without process or color of law. This is arbitrary power. The President has no arbitrary power. Congress has none to give him. It has no power to declare his order a defense to those who execute it, if not otherwise legal.” *But see Kulp v.*

obvious target for constitutional conservatives precisely because it broke with constitutional tradition and was based on a novel assertion of a power not enumerated to the federal government under Article I. There is meaning to the choices and arguments made by constitutional conservatives that Neely does not sufficiently acknowledge.

Second, Neely's presupposition that all constitutional arguments were political misunderstands nineteenth-century constitutional culture. Because nineteenth-century Americans regularly engaged with the Constitution in newspapers and pamphlets, they demanded well-considered constitutional arguments from their political representatives given that Congress was the most powerful political body of the time. Genuine constitutional concerns could come first and inform both legal and political strategy and action. Third, Neely's argument that Democrats were inconsistent in their constitutional positions ignores the public constitutional debate of 1863. For Neely, the Civil War was a "great constitutional embarrassment for Democrats who floundered from position to position," abandoned Jacksonian constitutional principles, and crafted a "ridiculous" and unconstitutional platform in 1864 aimed at creating new law rather than the usual language of preservation.⁷¹ Yet, even if true, this ignores the ways in which Democrats, as constitutional conservatives, argued consistently throughout 1863 that the Constitution needed to remain *fixed* despite the circumstances of war. If constitutional conservatives were desperate, it is precisely because the conditions of war heightened the significance of these constitutional battles by making them time-sensitive.

Ricketts, 3 Grant 420 (Pa. 1863) (upholding Section IV as constitutional under the precedents of *Cohens v. Virginia* and *Martin v. Hunter*).

There is, unfortunately, not space here to sufficiently cover those cases or issues. And neither issue occupied the same space in the public constitutional debate nor court actions.

⁷¹ *Ibid.*, 167. Neely calls the platform a "mishmash of constitutional issues." He argues that Democrats "quietly" let the theoretical and canonical affirmations of state sovereignty "slip away, never to return," abandoning their commitment to Jeffersonian states' rights theory because secession and the right were seen as an indictment of those theories. *Ibid.*, 138-143. Even if this was true in 1864, it only happened once they had lost a series of courtroom battles.

Because Neely assumes that constitutional law is window dressing for politics, he misses that constitutional values and politics were constantly in dialogue in nineteenth-century America. Nineteenth-century political debate often took the form of constitutional dialogue, but not all constitutional arguments were necessarily driven by politics itself. Constitutional conservatives genuinely believed in a strict interpretation of the Constitution. Likewise, Lincoln and the constitutional nationalists engaged with constitutional conservatives on the meaning of the Constitution. Their views must, therefore, likewise be taken as sincere. The Constitution was a nationalizing document which created a common American language even if Americans disagreed on interpretation and application. Constitutional arguments mattered broadly enough for American citizens generally to be comfortable talking about the Constitution.⁷² Political parties needed to worry about constitutional arguments because they believed such arguments mattered to voters who already valued them independent of politics through a common constitutional culture which celebrated the founding. As legal historian Michael Les Benedict attests, the national political platforms of the Civil War Era, between 1856 and 1876, attest to the centrality of constitutional issues to politics.⁷³

Neely's argument that Democratic judges *developed* arguments against the constitutionality of conscription in 1863 ignores the role of the public constitutional debates throughout 1863 in crafting those arguments.⁷⁴ Constitutional arguments against conscription were readily available in the press and as party members, it is reasonable to assume that these

⁷² Timothy Huebner, *Liberty & Union*, 18-19. Huebner notes that the Constitution was a "sacred public text" and notes that the nineteenth century constitutional culture reflected an attachment to the founding texts that was "clearly evidence" in print sources and was definitely not about popular constitutionalism. *Ibid*, XI.

⁷³ Michael Les Benedict, "At Every Fireside: Constitutional Politics in the Era of Reconstruction," in *Constitutionalism in the Approach and Aftermath*, ed. Paul D. Moreno & Johnathan O'Neill, ed. (New York: Fordham University Press, 2013), 153. Benedict says, "Plank after plank explicitly or implicitly dealt with constitutional issues-state rights versus national, equal civil and political rights, separation of church and state, federal authority to engage in internal improvements, general restatements of commitments to limited government."

⁷⁴ Neely, *Lincoln and the Democrats*, 161.

state judges would have had access to them. For instance, 1863 state convention literature shows the serious attention paid by Democrats to constitutional arguments.⁷⁵ This reflects once more Neely's inability to take constitutional conservatives and their constitutional arguments sincerely. His contention that arguments in the courts focused on state rights, a term ill-defined by Neely, does not carefully consider arguments focused on federalism and the Constitution's structure and history. Neely seems to employ states' rights as a pejorative standing for arguments in defense of white supremacy. As noted, Democrats certainly made voracious arguments against "abolitionist war" and the policy of emancipation and confiscation. But they did not see conscription as unconstitutional because Republicans had converted the war to an effort in favor of abolition-that fact made the policy *unjust* to Democrats and a reason for them to oppose it *politically*. Democrats adopted numerous positions abhorrent to current moral standards, but attributing all their choices to racism would miss nuance.

Much of the evidence for this dissertation comes from the November 1863 Pennsylvania Supreme Court decision of *Kneedler v. Lane* which declared the Conscription Act unconstitutional. Neely's minimizes *Kneedler* because he seems unable to be convinced by their constitutional arguments, making a normative claim that few if any good arguments exist against national conscription.⁷⁶ Neely believes that the best constitutional attack was in defense of state militias and the notion that the act threatened state power by allowing the federal government to

⁷⁵ What is the answer to Neely's question as to why the Democrats, the party who clung most to the text of the Constitution, endorsed a "flatly unconstitutional" peace platform in 1864? *Ibid.*, 8. Likely because they had already heavily engaged in the public constitutional debates of 1863, an effort led more by constitutional conservative Democrats than radical Democrats like Vallandigham and George Pendleton, whom Neely calls a "great liability" to McClellan's 1864 campaign. *Ibid.*, 92. The Democratic platform of 1864 may have had "no direct complaints" about conscription, but the "blanket complaint" about the disregard of state rights acknowledges the issue was not forgotten.

⁷⁶ *Ibid.*, 156. He also claims that Democrats were wrong and their "noisy constitutionalist" arguments were a poor choice anyway since Congress held unlimited power to raise armies and thus Democrats should have focused on issues of economic justice. Democrats only settled on conscription because they were "looking around, no doubt, for other constitutional issues" to make Lincoln seem like "a tyrant."

conscript all able-bodied males, but Neely also calls these arguments “backward-looking positions rooted in an all but Balkanized vision of states’ rights” necessary because Democratic judges had “nowhere else to go.”⁷⁷ States were not, Neely claims, “ancient cities to be walled off from the power of the national government.”⁷⁸ Yet, regardless of whether or not the arguments of constitutional conservatives were *correct*, they were part of an intense public constitutional debate during 1863 in a search for the best arguments against an act they felt was surely against constitutional tradition. Constitutional tradition is necessarily backward-looking, but because it was such a strong political and cultural value of the time, it was not merely a constricting worldview for desperate Democrats.⁷⁹

Neely’s comments are not without precedent. In 1967, the American Bar Association published an article by J.L. Bernstein describing the “amazing case” of *Kneedler v. Lane*.⁸⁰ John W. Delehant, a Federal District Court judge, responded to Bernstein’s article in the same 1967 ABA journal. Delehant’s examination of *Kneedler* found it to be “not so amazing” in that the preliminary injunctions granted in November were never issued and thus, essentially meaningless. Upon review, he found that *Kneedler* was “quite inadequate to prompt” or even

⁷⁷ *Ibid.*, 157. Neely also claims that the Democrats’ wartime positions did not “add up to any systematic or coherent view of constitutional interpretation or a vision of the Constitution.” *Ibid.* at 171. He says there was “nothing particularly conservative about the Democrats’ constitutionalism during the Civil War” and that they “floundered from position to position.” *Ibid.* at 170. Constitutional conservatives were consistent in the particular constitutional arguments they focused on and the broader objection to the threat of despotism and unlimited federal power. In 1863 around the issue of conscription, constitutional conservatives did not flounder from position to position and were conservative in their desire to maintain a Jacksonian strict constructionist understanding of federalism.

⁷⁸ *Ibid.*, 157.

⁷⁹ Neely’s comments that Democratic lawyers’ obsession with English law was evidence of their desperation does not parse. Strict constructionists not only looked to constitutional tradition in terms of the founding fathers’ intentions, but also the English legal tradition and common law that so influenced the founding fathers.

⁸⁰ J.L. Bernstein, “The Amazing Case of *Kneedler v. Lane*,” *American Bar Association Journal*, Vol. 53, no. 8 (1967): 708-12.

support “a conclusion or a suspicion that the present” draft was unconstitutional.⁸¹ Delehant was dismissive of the three-judge majority, saying they could not exactly identify a “rational approach” to explain why the draft was unconstitutional and an invasion of the rights of the states and citizens, nor did it adequately support the exercise of jurisdiction by the Pennsylvania courts to enjoin the actions of the United States. Delehant notes that it was “not without at least minor significance” that some if not all the opinions possessed “notably political overtones.”⁸² Ultimately, Delehant minimized *Kneedler*’s significance both by treating it as a political act and by endorsing the veracity of the Supreme Court’s decision in *Arver v. United States* in 1918. Like Neely, by treating *Kneedler* as a overt political act without practical meaning ignores that the decision, even if it did had no practical legal effect to stop the federal draft, met the goals of constitutional conservatives by finding the Conscription Act unconstitutional in court, opening the door for the Supreme Court to finally resolve the issue.

In earlier works, Neely made similar dismissive arguments about the conscription cases. In his 2011 *Lincoln and the Triumph of Nation*, Neely argued that the only Supreme Court decision of any note about the war issue during the war was the *Prize Cases* in 1863.⁸³ He rightly notes that the state courts offered the greater number of venues to hear the complaints of citizens and judges could issue writs of *habeas* to examine cases of wrongful restraint of their states’ citizens.⁸⁴ Thus, the “real constitutional history of the Civil War” in the North was fought at levels below the appellate. Confusingly, Neely argues that this door was “opened by the bias toward freedom in the American constitutional and legal system,” which made conscription

⁸¹ John W. Delehant, “A Judicial Revisitation Finds *Kneedler v. Lane* Not So ‘Amazing,’” *American Bar Association Journal*, Vol. 53, no. 12 (1967): 1132. Delehant’s article was a reprint of a memorandum produced while sitting on a case in the Central District of California, *United States v. Richmond*.

⁸² *Ibid.*

⁸³ Neely, *Lincoln and the Democrats*, 166.

⁸⁴ *Ibid.*, 167.

“seem unthinkable to some judges, despite the law of Congress and the plain wording of the Constitution on the power to raise armies.”⁸⁵ He is clear again that he believes the arguments against conscription to be wrong. For him, regarding volunteering for military service as purely contractual, as Justice James Thompson did in *Kneedler v. Lane*, displayed the legal bias in favor of freedom.⁸⁶ Neely appears to both be openly skeptical of the principle *stare decisis* and the importance of precedent in the American legal system, as he later quips that Democratic judges were “stubbornly independent by trade and slaves to precedent by inclination.”⁸⁷ Ultimately, Neely must mean that judges were only right if they placed loyalty and fidelity to the nation above commitment to *stare decisis*.

Between Neely’s multiple works, he has consistently argued that the constitutional battles of the Civil War show how national interests ultimately trumped constitutional resistance. In those battles, he sees the Democrats as rightful losers. Given his voluminous work on the subject compared to the paucity of other historic works on it, it is necessary to grapple with Neely’s arguments. He did the important work of analyzing the constitutional opposition and identifying the significance of the state courts during the Civil War. However, this dissertation argues that Neely made an error over his many works in failing to take seriously the constitutional arguments of Democrats-particularly constitutional conservatives. By doing so, he missed the ongoing public constitutional debate in 1863 over the difficult question of whether conscription

⁸⁵ *Ibid.* What Neely means by “bias towards freedom” is unclear, nor is it obvious he means this sardonically.

⁸⁶ It is another strange argument. Americans in the late 18th century understood many legal concepts, including constitutions, through the prism of contract law. That they would understand raising armies by volunteerism the same way seems very unsurprising. Thompson’s argument was that the general method to raise armies in Britain and the United States in this period was by voluntary enlistment.

⁸⁷ *Ibid.*, 172-74. Again, Neely’s description is telling. Calling judges “slaves to precedent” fails to understand judicial norms around the principal of *stare decisis* or the doctrine of precedent. To Neely, the difference between Republican and Democratic judges who followed this precedent was that Republicans expressed squeamishness about releasing soldiers from service and were searching for legal footing to “resist the slide down the slippery slope of favoring individuals over the army.” *Ibid.*, 174.

was constitutional. Finally, his work runs counter to recent works of legal scholars who have helped move the historiography away from the nationalism paradigm towards internalist explanations focused on doctrine and constitutional ideas.

As much as historians have grappled with the constitutional history of the American Civil War, they have often missed the importance of legal doctrine and precedent. Michael Les Benedict notes that historians wrestle “with the relationship between legal doctrine and what is being called ‘popular constitutionalism,’ and the even more blurry line between politics and law.”⁸⁸ As Cynthia Nicoletti in her brilliant study of Jefferson Davis’s treason trial, *Secession on Trial*, shows, legal doctrine mattered a great deal to Civil War lawyers. Americans looked to the massive armed conflict to determine the legitimacy of the ultimate expression of state sovereignty-the right of secession-over the legal process. Americans thus also faced the “uncomfortable realization” that their society, despite its enlightened rationalism and adherence to rule of law, used a repudiated medieval superstition-“trial by battle”-to confront succession and thus the war had affected “monumental constitutional change through extraordinary and extra-constitutional means.”⁸⁹ For this dissertation, this means one cannot understand the importance of the constitutional debate over conscription without first considering it from the standpoint of lawyers.⁹⁰ For lawyers arguing before courts, writing pamphlets, and speaking as

⁸⁸ Benedict, “At Every Fireside,” 133. It is “possibly the most significant paradox of American public life that judicial review seems to rely on the notion that constitutional interpretations are matters of law rather than politics, while history teaches that they are contested and contingent, the result of conversation among an elite of elected representatives, government officers, judges and lawyers, and a more general public, often pressing for change from below.

⁸⁹ *Ibid.*, 87, 119-120. Nicoletti concludes that Americans had to put secession on trial in order to neutralize the development of trial by battle and restore the rule of law, as the war had demonstrated Americans’ commitment to the legal system was “troublingly thin, particularly in difficult circumstances.”

⁹⁰ Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (New York: Cambridge University Press, 2017), 85-6. Nicoletti understands constitutional change during the Civil War as occurring through trial by battle. In other words, war could decide the legality of secession and the permanency of the Union. The medieval metaphor of war as trial by battle let survivors harmonize, “albeit imperfectly,” the seemingly incompatible imperatives of law and violence.”

representatives in Congress, conscription was a *novel* issue because it had never been decided before by an American court. This dissertation does not address Nicoletti's argument about trial by battle but seeks to show how constitutional conservatives were among the Americans who, realizing how the war was altering the Constitution, tried to fight back through the legal process.

Along with Nicoletti's important work, Peter Charles Hoffer's 2018 *Uncivil Warriors: The Lawyers' Civil War* makes apparent the impact of lawyers on the Civil War. Hoffer, one of the foremost modern legal historians, aimed to show how lawyers-especially politicians trained as lawyers and government lawyers- played a vital role in the Civil War. Their influence went beyond courtroom pleadings and judicial opinions to executive orders, treatises, election debates, journal entries and letters "filled with legal ideas."⁹¹ Hoffer emphasizes how the legal training and experience of Civil War lawyers framed the issues and handling of the great questions of secession and the war. He argues that as a result of the influence of lawyers, the Civil War was transformed and relatively restrained, making "ours a Civil War by lawyers, of lawyers, and in the end, for lawyers." The war both provided new venues for legal work and "changed the very nature of federalism," with the national government no longer a "junior partner in the federal system."⁹² As this dissertation argues, the constitutional arguments and cases concerning conscription help to explain how the war changed the nature of federalism despite the opposition of constitutional conservatives.

⁹¹ Peter Charles Hoffer, *Uncivil Warriors: The Lawyers Civil War* (Oxford: Oxford University Press, 2018), 3.

⁹² *Ibid.*, 4-5. Previously, Hoffer argued that during the Civil War period, the Madisonian Compromise faced its "greatest peril." While not the "first line of defense" for the Union, courts still had to "determine the lawfulness of wartime congressional acts and presidential decrees." At stake was the "separation of powers system the framers had embedded in the Constitution" and the threat to the relationship between federal and state courts in federalism was "even more obvious." Peter Charles Hoffer, William James Hoffer, & N.E.H. Hull, *The Federal Courts: An Essential History* (Oxford: Oxford University Press, 2016), 147.

The influence of lawyers went right to the top of government. Hoffer observes that President Lincoln, a lawyer, put together a cabinet with an “imposing team of lawyers” that resembled a law partnership.⁹³ In particular, he notes that Congress too was led by lawyers, as “Radical and conservative, Republicans demonstrated their faith in the power of legislation at one time or another in the wartime Congress.”⁹⁴ Hoffer understands the use of constitutional tradition by Civil War lawyers to question Lincoln war policies. As he says, “using originalism to construe the meaning of the fundamental law was not an invention of Attorney General Edwin Meese or Justice Antonin Scalia,” but rather a “well-established constitutional heuristic in the nineteenth century.”⁹⁵ Hoffer calls the approach of constitutional conservatives “historical originalism,” using Supreme Court Justice Samuel Nelson and Maryland Senator Reverdy Johnson as examples of legal actors who used the past as a set of standards rather than a rigid rule.⁹⁶ This dissertation follows Hoffer’s example, using “historical originalism” to describe the interpretive approach of constitutional conservatives following the Jacksonian tradition.

Finally, legal historians have recently touched on the connection between nineteenth-century constitutional law and judicial politics. Many of the cases and judges discussed in this dissertation were in state courts. The judges were all popularly elected, which to the modern can lead to assumptions of bench politics. However, scholars argue in the nineteenth-century, judicial

⁹³ *Ibid.*, 50.

⁹⁴ *Ibid.*, 64. As an example, he points to the Massachusetts Senatorial team of Charles Sumner and Henry Wilson who were distinguished lawyers with “impeccable educational credentials” but who never had substantial practices and Samuel Fessenden, was also a lawyer and one of the chief financial planners in the war-time Congress. *Ibid.* at 65.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, 114-15. Hoffer was referring to Nelson’s dissent in *The Prize Cases*. Nelson argued that the framers gave Congress the power to call forth the militia and declare and prosecute a war, as from their experience with the “monarchical tyranny of George III, they rightfully were wary of giving the president untrammelled military authority.” Hoffer says that Nelson’s conceptualization of a “strict and limiting separation of powers” was like Buchanan’s December and January messages to Congress, limiting the executive to executing the will of another branch. Nelson argued that Congress could not give the President the war power.

politics was more complicated. Jed Shugerman argues that the adoption of popularly elected or partisan judicial elections in the nineteenth-century was as much a reflective of a widespread commitment to judicial independence as the rejection of popular elections were in the twentieth.⁹⁷ Shugerman argues that judicial elections came about in order to ferment accountability to the people while increasing separation of powers and judicial independence from the threat of corrupt legislatures.⁹⁸ The adoption by New York of judicial elections in 1846 “triggered a national revolution in judicial politics,” as many states, including Pennsylvania, followed suit into the 1850s.⁹⁹ The result was state courts much more likely to use the power of judicial review than any other prior period. As a result, judicial elections increased the use of judicial review, because judicial power and independence could “be defended simultaneously as the guardians of democracy and the guardians against too much democracy.”¹⁰⁰ Thus, at the time of the Civil War, elected judges were a growing norm in state judiciaries and it is not clear this led to politicization of the bench. This dissertation builds on Shugerman’s work by arguing that Pennsylvania’s Supreme Court used judicial review to protect the state’s sovereignty and democratic character against what they believed to be a tyrannical federal majority.

Even after nearly a century, James Randall’s influence remains predominant, as historians tend to view the constitutional history of the Civil War through the lens of the growing nation-state. There remains plentiful work to be done to understand the minority worldview during the Civil War that was genuinely disturbed by the radical changes to the Constitution. As

⁹⁷ Jed Handelsman Shugerman, *The People’s Court* (Harvard University Press, 2012), 271.

⁹⁸ *Ibid.*, 57. According to Shugerman, although Mississippi was the first state to have judicial elections in 1832, states did not follow immediately from Andrew Jackson’s endorsement. Instead, it required the banking crisis and economic depression of the late 1830s and early 1840s and New York’s Constitutional Convention in 1846. *Ibid.*, 84-85.

⁹⁹ *Ibid.*, 102-105.

¹⁰⁰ *Ibid.*, 143.

recent works of legal history show, the perspectives of lawyers and other legal thinkers helps illuminate the process by which the Constitution changed during the war and how that change was contested. This dissertation aims to describe how in 1863, conscription was understood to be an unconstitutional action by constitutional conservatives in Congress, in the press, and in the courts.

Constitutional conservatives lost most of the individual battles and the war, as they could not prevent the growth of the federal government nor stop national conscription. Yet, the intense struggle in 1863 shows that Lincoln and the Republicans did not easily win in the public constitutional debate. Their claims of new power were contingent on winning the constitutional battles over conscription and hinged on avoiding a Supreme Court decision they believed might rule against the act. In 1917 and 1918, despite constitutional opposition by socialists and labor groups, the judiciary no longer cared to strongly consider such arguments. Half a century later, during the Vietnam War, plenty of lawyers, scholars, and draftees still believed that the draft was unconstitutional, but the decisions of World War I courts controlled. It had become a key political issue once more and only the war and conscription's deep, growing unpopularity ended it in late 1972.

The Vietnam War was the last time conscription was seriously objected to on constitutional grounds. Despite the efforts of attorney Leon Friedman and the ACLU, who produced a 185-page memorandum covering the constitutional history of conscription back to the founding, the courts were unwillingly to revisit the draft's constitutional pedigree. Ultimately, the most serious public constitutional debates already occurred in 1863 and the best chance of defeating the draft constitutionality. The draft, known as the Selective Service Act, remains on the books, as on July 2, 1980, President Jimmy Carter reestablished registration

following the Soviet invasion of Afghanistan in 1979.¹⁰¹ Since then, American males must register at eighteen, as confirmed the Supreme Court's last ruling on the draft, *Rostker v. Goldberg*, which upheld the all-male draft against an Equal Protection challenge while noting that the Court "has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies."¹⁰² In recent years, Congressmen have even considered requiring women to register for the Selective Service and in January 2019, the National Commission on Military, National, and Public Service released its interim report considering ways to change the Selective Service System.¹⁰³ And in February, a Texas Federal District Judge ruled that the all-male draft was unconstitutional because women are now included in the arms services, a result likely to be appealed and perhaps to the Supreme Court.¹⁰⁴ Even without an active draft, the

¹⁰¹ Proclamation 4771, July 2, 1980, 94 Stat. 3775, available at: <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg3775.pdf>

¹⁰² *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (Chief Justice Rehnquist noting that "perhaps in no other area" did Congress enjoy greater deference than their powers over military and national affairs).

¹⁰³ Nicholas Mosvick, "Expand the Draft to Women-or Repeal it? A Long Constitutional Debate Continues," *The Conversation* (2016), <http://theconversation.com/expand-the-draft-to-women-or-repeal-it-a-long-constitutional-debate-continues-60505>; National Commission on Military, National, and Public Service Interim Report Executive Summary, Jan. 23, 2019, available at: <https://www.documentcloud.org/documents/5747780-190224-SELECTIVE-SERVICE-DECISION-Full.html> (a final report will come in 2020). Internationally, conscription remains a contentious issue. See "South Korea's Top Court Allows Conscientious Objection to Military Service," *Japan Times*, November 1, 2018, available at: <https://www.japantimes.co.jp/news/2018/11/01/asia-pacific/south-koreas-top-court-allows-conscientious-objection-military-service/#.XJUu1bh7mM8> ("nearly every able-bodied South Korean male between the ages of 18 and 35 must still complete around two years of military service" before this landmark ruling); "Thai Leader Tries Something New: Elections," *Wall Street Journal*, March 22, 2019, A16 (Thailand's opposition party, Future Forward, has vowed to end military conscription, a "deeply unpopular lottery that takes place each summer"); "Thailand's Annual Draft Highlights Growing Unease over Military Rule," *Wall Street Journal*, April 19, 2019, A16 (noting the use of a lottery in the Thai system, in which twenty-one year old men draw cards to learn their fate—black for exemption, red for assignment of up to two years of military duty—and that the succession of opposition parties pledging to end the draft has put the military junta "on edge"); "Why Germany is Talking About Compulsory National Service Again," *The Local DE*, August 6, 2018, available at: <https://www.thelocal.de/20180806/why-germany-is-talking-about-compulsory-national-service-again> (while military conscription was abolished in 2011, the conservative CDU is discussing reestablishing compulsory service, although the federal government is currently opposed).

¹⁰⁴ Gregory Korte, "With Women in Combat Roles, a Federal Judge Rules the Male-Only Draft Unconstitutional," *USA Today*, February 24, 2019, available at: <https://www.usatoday.com/story/news/nation/2019/02/24/military-draft-judge-rules-male-only-registration-unconstitutional/2968872002/>; National Coalition for Men v. Selective Service System, No. 4-16-03362 (TX-Houston 2019) <https://www.documentcloud.org/documents/5747780-190224-SELECTIVE-SERVICE-DECISION-Full.html>. The *NCM v. SSS* case resulted in a declaratory judgment with no immediate effect on federal policy and did not consider the constitutionality of the draft itself.

Selective Services Act, those who fail to register by twenty-six face a myriad of consequences including loss of student aid and even citizenship.¹⁰⁵ The results of the constitutional battles of 1863, which ultimately exhausted the best arguments against the draft, still reverberate today.

Chapter One discusses all the relevant constitutional debates and battles over conscription before 1863. This includes the founding-era debates over the militia power and standing armies, the Federalist opposition to conscription during the War of 1812, and the constitutional battles following the Fugitive Slave Act of 1850 over state court *habeas* jurisdiction for suits enjoining federal officials acting under federal law. This history is relevant precisely because the majority of suits in 1863 concerning conscription occurred by writ of *habeas corpus* in state courts and lower federal courts which first had to decide the jurisdictional question.

Chapter Two analyzes the Congressional debates over Senator Wilson's Enrollment Act or the Conscription Act in February 1863. Constitutional conservatives in Congress were the first to develop constitutional arguments against conscription. These arguments were significant both because many of the oppositional speeches were reprinted in pamphlets and newspapers and they established the core constitutional objections which newspaper editors and lawyers would follow over the course of the year. The debate in Congress centered on the need to preserve antebellum federalism and separation of powers. Constitutional nationalists in Congress focused their constitutional rhetoric on the necessities of war of the power of self-preservation inherent to nation-states.

¹⁰⁵ Gregory Korte, "For a Million U.S. Men, Failing to Register for the Draft has Serious, Long-Term Consequences," *USA Today*, April 2, 2019, available at: <https://www.usatoday.com/story/news/nation/2019/04/02/failing-register-draft-women-court-consequences-men/3205425002/> (government statistics say over a million men have lost benefits due to failure to register. Last year, the Selective Services referred 112,051 names to the Justice Department for possible prosecution, but only 20 men have been successfully tried since 1980, the last in 1986)

Chapter Three focuses on the events in New York newspapers and courtrooms in 1863. Two major episodes of public constitutional debate in the newspapers occurred, one coming in March immediately following the passage of the Conscription Act and another in July and August, following the New York City draft riots. The March debates broadly followed the Congressional debates, while following the riots, constitutional conservatives sought to push harder for a judicial decision on conscription and supporters of conscription blamed constitutional opposition to conscription for the riots. While New York saw a case decide against the constitutionality of conscription, it was limited to a city trial judge. When the question reached the New York Supreme Court, it never reached the merits, as multiple cases were decided solely on the question of state court *habeas* jurisdiction. At the end of 1863, there was a split among New York Supreme Court judges on the question of jurisdiction that would go unresolved until 1872.

Chapter Four addresses public constitutional debate in Pennsylvania and the major cases addressing conscription in the lower federal courts. As in New York, the public constitutional debate was most vigorous in March and July, following the draft riots. The two key actions concerning conscription in federal court came before Judge John Cadwalader. Cadwalader, although he ultimately upheld Congress's power to conscript under Article I, took arguments of constitutional conservatives seriously and ruled in their favor on the separation of powers question, holding that federal judges had power to review the decisions of Boards of Enrollment.

In Chapter Five, the case of *Kneedler v. Lane* is discussed in full. First, the group of four Philadelphia lawyers and their backgrounds in the Democratic Party is considered. It also introduces the judges whom ruled on the *Kneedler* case, considering both their political backgrounds and jurisprudential history. Next, this dissertation covers how the case was filed

and the arguments put forth by the three plaintiffs, how the case ended up before the whole Supreme Court in September, and the oral argument on September 23, which the government refused to appear at. The decision, released on November 9th, is analyzed through the opinions of all five judges who wrote separately. These five opinions give insight into the complexity of the suit, which was filed in equity, and speaks to the way the public constitutional debate influenced the Pennsylvania Supreme Court. In particular, the three judges who decided the Conscription Act was unconstitutional did not depart from the core arguments of constitutional conservatives focused on preserving antebellum federalism and state militia power. In the aftermath of their most significant victory, constitutional conservatives tried to ensure the decision would bar enforcement of the Conscription Act throughout the state of Pennsylvania and pushed to have the Supreme Court finally resolve the question.

In the final chapter, this dissertation discusses *Kneedler II*, the January 1864 reversal of the November decision. With the reversal, *Kneedler* now stood as positive precedent in favor of the constitutionality of conscription. Following the end of the Civil War, the Pennsylvania Supreme Court continue to fight over the meaning of *Kneedler* in a variety of conscription-related cases. In New York, state supreme court judges continued to battle over state court *habeas* jurisdiction. Ultimately, the Supreme Court resolved the question in *Tarble's Case* in 1872, upholding the rule of *Ableman v. Booth* against state court *habeas* jurisdiction while simultaneously asserting the right of Congress to conscript. Forty-five years later, in 1917, the United States' entrance into World War I brought about a second national conscription, one much more demanding. Court challenges arose again, with lawyers now utilizing the Thirteenth Amendment to argue conscription was unconstitutional, but justices resoundingly dismissed these constitutional arguments throughout the lower federal courts. The Supreme Court followed

suit in 1918 in *Arver v. United States*, unanimously upholding the power of Congress to conscript. This dissertation concludes with the Vietnam War cases, in which lawyers attempted to revisit the constitutionality of conscription to no avail. The die had already been cast long before 1972.

CHAPTER I: THE ROAD TO CONSCRIPTION

Constitutional battles over conscription began well before the American Civil War. As far back as the ratifying conventions in 1788, opposition voices raised concerns over federal power broad enough to allow for compulsory military service. In 1863, there were two principal questions at the center of the constitutional battles: whether the federal government had the power under Article I to directly call forth citizens into the regular army by conscription and whether state courts could properly take challenges addressing the act's constitutionality by writ of *habeas corpus* for release from federal custody. State court *habeas* jurisdiction was contested since the founding, but it was especially salient during the Fugitive Slave Act controversy in the 1850s. The Supreme Court's 1859 decision in *Ableman v. Booth* aimed to settle the issue, but state courts continued through the Civil War to resist federal judicial supremacy and assert the concurrent power of state courts to review federal acts by writ of *habeas corpus*. As to conscription itself, while the national draft was novel, the debates were largely familiar to American history at the time. In 1863, both constitutional conservatives and supporters of conscription invoked the founding tradition and the attempted conscription during the War of 1812 to buttress their position.

The two sides made serious and informed constitutional arguments, but they both failed to grasp the ambivalence of the constitutional history of conscription. Standing armies, not conscription as a method of raising armies, had been the chief concern of Anti-Federalists. Nevertheless, constitutional conservatives asserted that conscription had always been unconstitutional and rejected by the framers. Their rhetorical opponents claimed that

conscription was well known and accepted at the time of the founding. The historic reality is murkier—at the time of the founding, national conscription was not a policy familiar to Americans or in the British experience outside of impressment for seamen, but state drafts were widely used to fill militia ranks. Additionally, the conscription plan of Secretary of War James Monroe failed principally because the War of 1812 ended before Congress held a final vote on the bill, not because the constitutionality of conscription had been settled by the December 1814 debate. The stalling tactics of Federalists opposed to conscription as unconstitutional worked more out of happenstance than certainty that there was insufficient support for a draft, yet constitutional conservatives in 1863 focused solely on the constitutional objections assuming the opposition had rightfully defeated Monroe’s bill. On the other hand, constitutional nationalists in 1863 entirely minimized those objections as irrelevant while assuming a final vote would have passed the bill. The two sides fared no better in assessing the constitutional convention and ratification debates of 1787-88. In the fog of war, neither constitutional conservatives nor nationalists could articulate that while constitutional history informed the 1863 debates, it was not decisive precisely because national conscription was a novel power. It is thus necessary to review briefly both the founding debates over the militia power during the ratification debates and the fight over conscription during the War of 1812 to understand how they were applied to the constitutional battles of 1863.

Undoubtedly, during the ratification debates over the Constitution, the extent of federal power over the militia and individual citizens was a significant issue. In particular, Anti-Federalist rhetoric centered on the problem of standing armies and the threat of “military despotism.” Although standing armies are not the same as conscription, constitutional conservatives relayed Anti-Federalist concerns about military despotism and the destruction of

state power toward their draft opposition. According to historian Max Edling, the right to maintain a standing army in peacetime provoked the greatest opposition to the Constitution's militia clauses.¹⁰⁶ Anti-Federalists accepted that the state had the power, like other sovereigns, to raise and maintain regular troops, but objected to standing armies in peacetime. They feared liberty under a strong central government and the standing army showed an area in which the national government would have a greater reach into the lives of citizens. Anti-Federalists tried to pass amendments to place limits on the power to raise armies and to command the militia. For instance, the Virginia convention proposed that "standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to and governed by the civil power."¹⁰⁷ Similar proposals were seen from the North Carolina, New York, and Pennsylvania conventions and included language that would eventually make up the language of the Second Amendment.¹⁰⁸

Federalists responded to Anti-Federalist rhetoric by arguing that the powers in the Constitution would make for a stronger government and a respected nation. Federalists could accept many proposed restrictions on Congress's power over the militia, but not on the power to raise and maintain armies. They believed the error of the Articles of Confederation was to charge the national government with general defense but leave state governments with the

¹⁰⁶ Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford: Oxford University Press, 2003), 89.

¹⁰⁷ *Ibid.*, 90-91.

¹⁰⁸ *Ibid.*, 9. Proposals to alter the language of the Constitution before ratification included suggestions to continue the system of requisitions and allow a fixed quorum of state legislatures the right of disapproval, to stipulate exact numbers of troops that could be raised by direct levy, and define precisely the purposes for which regular troops could be employed in peacetime lawfully. Edling suggests that Anti-Federalists had two goals in mind when making these proposals. They wished to limit Congress's use of the militia and wished to prohibit Congress from disarming the people and to protect against Congressional "neglect to organize, arm, and discipline the militia." *Ibid.*, 92.

effective means to provide for that defense, which in practice was a scheme of quotas and requisitions “equally impracticable and unjust.” Experience proved that power needed to be transferred from states to Congress for general defense.¹⁰⁹

The Federalist defense of extensive federal power over the militia and to raise armies was most powerfully argued by Alexander Hamilton in several essays in the *Federalist Papers*. In 1863, constitutional nationalists founded much of their argument in favor of conscription upon the notion that the founding generation approved of conscription on Hamilton. For Hamilton, the means deployed by Congress under the power to “raise armies” could not be limited.¹¹⁰ The problem for Hamilton of relying on the states was made clear by the experience under the Articles. In *Federalist* 22, he argued that the power of raising armies, “by the most obvious construction of the Articles of the Confederation,” was “merely a power of making requisitions upon the states for quotas of men.”¹¹¹ Hamilton blithely dismissed the fears of Anti-Federalists over the specter of a standing army. In *Federalist* 25, Hamilton questioned both what precisely a standing army was and how much citizens were willing to let their fear of standing armies harm

¹⁰⁹ *Ibid.*, 94. In *Federalist* 23, Hamilton wrote that, “We must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust. The result from all this is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.” Alexander Hamilton. *Federalist* No. 23, in *The Federalist*, ed. George W. Carey & James McClellan (Indianapolis: Liberty Fund, 2001), 114.

¹¹⁰ Alexander Hamilton. *Federalist* No. 23 at 114. For Hamilton, unless it could be shown that the “circumstances which may affect the public safety are reducible within certain determinate limits and unless the “contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the formation, direction, or support of the *national forces*.” *Ibid.*, 113.

¹¹¹ Alexander Hamilton, *Federalist* No. 22, in *The Federalist*, ed. George W. Carey & James McClellan (Indianapolis: Liberty Fund, 2001), 105. Hamilton reiterated that the old quota method of raising troops was “not more unfriendly to economy and vigor than it is to an equal distribution of the burden, “as states “near the seat of war, influenced by motives of self-preservation, made efforts to furnish their quotas, which even exceeded their abilities; while those at a distance from danger were, for the most part, as remiss as the others were diligent, in their exertions.....The system of quotas and requisitions, whether it be applied to men or money, is, in every view, a system of imbecility in the Union, and of inequality and injustice among the members.” *Ibid.*, 106.

the nation's ability to protect itself from invasions, both domestic and foreign. He believed the national government must be able to judge both the duration and extent of danger or impending danger to the peace and safety of the community. Strict prohibitions on the ability of the national government to maintain a peacetime standing army were problematic because the militia was insufficient protection against impending danger. As Hamilton wrote, "If, to obviate this consequence, it should be resolved to extend the prohibition to the *raising* of armies in time of peace, the United States would then exhibit the most extraordinary spectacle which the world has yet seen, that of a nation incapacitated by its Constitution to prepare for defense, before it was actually invaded."¹¹²

Finally, Hamilton confronted the criticisms of Anti-Federalists concerning the power to regulate the militias in *Federalist* 29. He sensed that Anti-Federalist critiques at their heart had an obvious contradiction. Hamilton reasoned that, "If a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security."¹¹³ To Hamilton, if in fact standing armies were dangerous to liberty, it followed that an "efficacious power over the militia, in the body to whose care the protection of the state is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions."¹¹⁴ Hamilton's robust

¹¹² Alexander Hamilton, *Federalist* No. 25, in *The Federalist*, ed. George W. Carey & James McClellan (Indianapolis: Liberty Fund, 2001), 124.

¹¹³ James Madison agreed that that standing armies were an "intrinsic part" of modern states, writing in *Federalist* 41 that "security against foreign danger" was an "avowed and essential object of the American Union" and "powers requisite for attaining it must be effectively confided" to Congress. James Madison, *Federalist* No. 41, in *The Federalist*, ed. George W. Carey & James McClellan (Indianapolis: Liberty Fund, 2001), 208.

¹¹⁴ Alexander Hamilton, *Federalist* No. 29, in *The Federalist*, ed. George W. Carey & James McClellan (Indianapolis: Liberty Fund, 2001), 140-141. Decades later, in his *Commentaries*, Justice Story wrote that, "At one time it was said, that the militia under the command of the national government might be dangerous to the public liberty; at another, that they might be ordered to the most distant places, and burthened with the most oppressive services; and at another, that the states might thus be robbed of their immediate means of defense. How these things could be accomplished with the consent of both houses of congress, in which the states and the people of the states are represented, it is difficult to conceive. But the highly colored and impassioned addresses, used on this occasion, produced some propositions of amendment in the state conventions, which, however, were never duly ratified, and

interpretation of Congress's Article I military powers as essential to national security and thus liberty were continually evoked by constitutional nationalists in 1863.

Still, despite Hamilton's theory of extensive national power and his push throughout the 1790s to adopt a national standing army, there was no national army conscription in the eighteenth century. Neither the Militia Act of 1792 or 1795 attempted to do so, despite the early efforts of President Washington's Secretary of War, Henry Knox, to put conscription into place.¹¹⁵ The well-known and accepted practice during the Revolution was the use of state militia drafts to fill up the federal army ranks. Constitutional conservatives recognized this, as they objected not to the power to conscript *per se* but argued states had always traditionally held the power to draft, not the federal government. In the decades after the Revolution and ratification of the Constitution, that tradition held firm but was challenged numerous times. The key challenge came during the War of 1812, when Secretary of War James Monroe proposed national conscription in late 1814, getting the bill nearly through both chambers of Congress before the war ended. The extent to which the bill failed due to constitutional opposition became fuel for the debate in 1863.

The First Conscription Debate: The Federalists and the War of 1812

During the War of 1812, Federalists were the principal constitutional opposition, immediately resisting the federal build-up for the war and requisitions for militia troops. On April 1, 1812 President James Madison requested a new sixty-day embargo against Britain. Nine days later, Congress acted to call out 100,000 militiamen, requiring a quota for 20,000 from New

have long since ceased to be felt, as matters of general concern." Joseph Story, *Commentaries on the Constitution of the United States*, Vol. III, Ch. XXII, §1197 (1833), available at: https://www.constitution.org/js/js_322.htm.

¹¹⁵ The 1790 bill of Knox was to include all free male inhabitants between eighteen and sixty divided into three classes by age with drafted persons to serve three years as regulars. "Conscription," *The Independent....Devoted to the Consideration of Politics, Social and Economic Tendencies*, August 20, 1863, 4.

England.¹¹⁶ By May 31, Madison sent a war message to Congress citing the issues of impressment, the blockade, and support of America's Native American enemies. Congress acted in June to declare war, with the House decisively supporting it on June 4th and the Senate narrowly affirming it on June 18th.¹¹⁷ Four days later, General Henry Dearborn, the ranking officer in New England, requisitioned forty-one companies of militia from Massachusetts, five from Connecticut, and four from Rhode Island.¹¹⁸ The Governors of these three New England states all declined to meet Dearborn's requisition request.

When Secretary of War William Eustis informed Connecticut Governor Roger Griswold of the quota, Griswold asked the Council of Connecticut whether militia could be legally demanded before one of the enumerated exigencies under Article I had arisen and whether a requisition that placed any part of the militia under a federal officer was proper. In June 1812, the Council found that General Dearborn's requisition request was wanting because "none of the exigencies recognized by the constitution and laws of the United States" were shown to exist and thus, the militia could not be withdrawn from the governor's authority.¹¹⁹ The acts of Congress

¹¹⁶ Carl Edward Skeen, *Citizens Soldiers in the War of 1812* (Lexington: University of Kentucky Press, 1999), 65.

¹¹⁷ Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: W.W. Norton & Co., 2005), 154.

¹¹⁸ Donald R. Hickey, "New England's Defense Problem and the Genesis of the Hartford Convention," 4 *New England Quarterly*, Vol. 50 (1977), 589.

¹¹⁹ Theodore Dwight, *History of the Hartford Convention: With a Review of the Policy of the United States Government Which Led to the War of 1812* (New York: N.J. & White Co., 1833), 246 (To take it from them was a "consolidation of the military force of the States" that would cause the "security of the State Governments" to be lost and their existence made dependent upon the "moderation and forbearance of the National Government.""). Theodore Dwight, who was the secretary of the Hartford Convention and the brother of Timothy Dwight, the famed Yale president and theologian, wrote an account of the New England opposition and the convention in 1833. Dwight's account is obviously biased. Yet, as a leading federalist and trained lawyer, he said a great deal about constitutional arguments. He wrote that any attempt by the President or Congress beyond the prescribed limitations in the Constitution would be "usurpation," citing Article II's "Commander-in-Chief" clause. *Ibid.* at 271-72. He also attacked President's request for quotas, saying that it "was manifestly the object" of Madison to take state military forces and thus their independence, placing the whole military force of the country under the command of the President. *Ibid.* at 272. For Dwight, beyond the specified circumstances, the United States had not and could not make any claim upon the militia for military services. There was no authority in the constitution to take citizens from their homes and from the militia under the command of United States officers and subject to the duties of a standing army.

of 1795 and 1812 were in *strict* pursuance of the Constitution and provided for calling forth the militia into the *actual service* of the United States for the exigencies constitutionally required. The Council perceived no warrant in the Constitution or laws of the United States for “taking from the officers duly appointed by the state” and thus “eventually destroying the military force of the state.”¹²⁰

The Council’s opinion was that the powers of Congress over the militia were strictly limited and not plenary. To “guard against any possible mischief that might arise” either to the states or the individual citizens, the Constitution explicitly gave Congress the power to “provide for organizing, arming, and disciplining the militia” while reserving to the states respectively the powers over the appointment of officers and training.¹²¹ No proposition could be clearer than if the draft had succeeded, that the rights of the militia would have been sacrificed. If the states had allowed this with a “total disregard” for the Constitution, it would have proved “fatal to the liberties” of the country.¹²² If the President had the constitutional right to call forth hundred thousand militia under the act of Congress of April 10, 1812 through federal officers, then the states were deprived of their natural and legitimate means of defense.¹²³ The Council contended that while war had been declared by Congress against Great Britain, no place in Connecticut or throughout New England had been “particularly designated as in danger of being invaded.”¹²⁴ If Congress declared war before they carried execution the provision of the Constitution to “raise and support armies,” it did not follow that the militia were bound to “enter their forts and

¹²⁰ *Ibid.*, 247.

¹²¹ *Ibid.*, 249.

¹²² *Ibid.*, 250 The President aimed to strip the states of their “natural and constitutional defenders” and subject the militia to the hardships and degradations always experienced with standing armies.).

¹²³ *Ibid.*, 255.

¹²⁴ *Ibid.*, 259.

garrisons to perform ordinary garrison duty, and wait for an invasion.¹²⁵” The Council argued the demands of the United States had to be strictly in obedience to the requirements of the Constitution and the sovereignty of the states.

General Dearborn tried to appease the Connecticut Council, but on August 4, 1812, they met again and continued to insist that Governor Griswold not send the requested militia until the circumstances stipulated by the Constitution were met.¹²⁶ The same day, in a message to the General Assembly, Griswold pronounced a similar view of state reserved rights, which he deemed “essential interests” that should not be neglected. General Dearborn’s request was unconstitutional and could not be complied with in strict accordance with the Constitution’s limitations on calling out the militia.¹²⁷ The Constitution allowed that in time of war, “states may organize and support a military force of their own, and which cannot, under any circumstances, be controlled by the general government.”¹²⁸ Griswold believed that the Constitution did not allow for a declaration of war to be sufficient for the national government to control the militia. Otherwise, they could be used in any type of war-including an offensive campaign. In response, both Connecticut houses passed the resolution and the general assembly resolved that the United States was delegated the power to call forth the militia for three stated purposes and the states reserved “the entire control of the militia, except in the cases specified.”¹²⁹

¹²⁵ *Ibid.*, 260-61.

¹²⁶ Skeen, *Citizen Soldiers*, 66-67.

¹²⁷ Dwight, *History of the Hartford Convention*, 263.

¹²⁸ *Ibid.*, 265. Defenders of conscription in 1863 suggested the arguments of Griswold and the Massachusetts Supreme Court were the precise position of the “Copperheads” who were not ashamed to use the old weapons of the “armory of the old Hartford Convention.” This included Griswold’s “absurd” claim that private soldiers could not be detached from the bodies they belonged to when called into service of the United States and the Massachusetts Supreme Court justices, who declared the power of deciding whether the exigency existed to call out the militia belonged to the states, going against the later Supreme Court precedent of *Martin v. Mott* and *Luther v. Borden*. “Conscription,” *The Independent*, 4.

¹²⁹ *Ibid.*, 269. The state and its executive could maintain their “immunities and privileges” and while prepared to perform their duties, would not leave the state defenseless. Dwight suggests that the votes of that fall

Events unfolded similarly in Massachusetts and Rhode Island. In Massachusetts, the unpopular Elbridge Gerry, a founding father and Republican who supported the national administration and war effort, was replaced as governor by Federalist Caleb Strong.¹³⁰ Strong, another founder who had helped draft Massachusetts' Constitution, was reluctant to let the state militia fall under the command of the federal army. Governor Strong turned the constitutional questions over to the opinion of the Justices of the Supreme Judicial Court. He asked for a response on two questions. One, whether the Commanders in Chief of the militia of the several states had a right to determine whether exigencies contemplated by the Constitution existed to require them to place the militia in the service of the United States. Two, whether by the existence of said exigencies, if the militia "thus employed can be lawfully commanded by any officer but of the militia, except by the President." The Supreme Judicial Court answered that under the state constitution, command of the militia was vested exclusively in the governor and with it, the right to determine whether any of the three Article I exigencies existed. The Massachusetts justices wrote that if the power was given to Congress, it would "in effect" place all the militia at the "will of the Congress and produce a military consolidation of the states, without any constitutional remedy." Further, to allow Congress to place the militia under the command of an officer not of the militia would "render nugatory the provision that the militia are to have officers appointed by the states."¹³¹

Based on this advice, Governor Strong responded just as Governor Griswold had. On August 5, he informed Secretary of War Eustis he would not comply with the requisition based

showed the people of the state by a "very large majority" approved of the course of the governor and council with regards to the militia.

¹³⁰ Skeen, *Citizen Soldiers*, 67.

¹³¹ "His Excellency Governor Strong, Delivered before the Legislature of Massachusetts, October 16, 1812, with The Documents Which Accompanied the Same. To which is added, the Answer of the House of Representatives." Boston: Russell and Cutler, 1812. 21-24.

on the advice of the Massachusetts Supreme Court and state council.¹³² That October, Strong gave a speech discussing the division between federal and state control over the militia and elaborated on his reasons for denying Eustis' request. Like Griswold, he believed there were no indications that Massachusetts or other states were in imminent danger of invasion. Strong stated the Article II language of "into the actual service of" meant that the President had no authority to call the militia out except under the three exigencies given by the Constitution in Article I. Otherwise, the President and Congress could act to declare war at any time and call out the "whole militia" to "march them to such places as they may think fit" and retain them as long as war continued. To Strong, the power to call the militia into service had always been understood to be exercised only in emergencies, not to create standing armies or carry out offensive war. Thus, the act of declaring war could not by itself grant the federal government the right to call the militia into service. In Rhode Island, Governor William Jones followed suit, asking his council of war the same questions Strong asked of the Massachusetts Supreme Judicial Court. Jones' council of war agreed that the state executive, not the President or Congress, decided when the constitutional exigencies existed.¹³³ Yet, outside of these three New England states, only Maryland's legislature responded supportively to their constitutional opposition.¹³⁴

The events of 1812 showed that not only did some states withhold their militias based on a constitutional interpretation of limited federal power, but showed the federal government that they might not be able to rely on the militia and volunteers to fight wars. Even though the 1792

¹³² Skeen, *Citizen Soldiers*, 67-68. The Massachusetts House would support Strong's action, but state Senate dissented.

¹³³ *Ibid.*, 68. However, according to Donald Hickey, Rhode Island officials did not enter into a "lengthy constitutional analysis" like the Connecticut Council and Massachusetts Supreme Court and did not raise the issue of whether militias could serve under regular army officers. Donald R. Hickey, "New England's Defense Problem," 590.

¹³⁴ *Ibid.*, 70 (On December 22, 1812, Maryland's Federalist legislature declared the April 10 call for requisitions unconstitutional because the constitutional exigencies had not been met).

Militia Act was two decades old, there was no uniform organization of the militias, who were often poorly equipped and undisciplined.¹³⁵ Although New England officials cooperated when the enemy threatened their states, attempts to keep militia units under the command of state officers proved unsatisfactory. Under the demands of war, the federal army searched for manpower solutions. In June 1814, General Dearborn arrived in Boston with a new code of army regulations, placing militia troops into companies of 90 to 100 men under regular army officers.¹³⁶ By October 1814, Secretary of State James Monroe had produced a bill to have all free males between eighteen and forty-five be formed into classes of hundred and if any class failed to provide the men required, they “shall be raised by draft on the whole class.”¹³⁷ He saw no “well-founded objection” to Congress’ right to “raise regular armies, and no restraint is imposed in the exercise of it, except in the provisions which are intended to guard generally against the abuse of power, with none of which does this plan interfere.”¹³⁸ Monroe thought it absurd to suppose that Congress could not carry that power into effect otherwise than by accepting voluntary service of individuals since the power to raise armies was “made with a knowledge of all these circumstances and with the intention that it should take effect.”¹³⁹ Such unqualified grants of power gave the means necessary to carry this power into effect.

Further, the power to organize the militia was an “act of public authority, not a voluntary association.” Monroe claimed that his plan was not more compulsory than militia service itself. He stated that though the “limited power” the United States had to organize the militia could be

¹³⁵ Skeen, *Citizen Soldiers*, 76.

¹³⁶ Donald R. Hickley, “New England’s Defense Problem,” 591-96.

¹³⁷ Dwight, *History of the Hartford Convention*, 318. Monroe’s plan was described in an October 27 letter to Congressmen G.M. Troup, Chairman of the House Committee on Military Affairs. “Draft Cases Ready for Supreme Court,” *New York Times*, December 10, 1917.

¹³⁸ Dwight, *History of the Hartford Convention*, 319.

¹³⁹ *Ibid.*, 320 The premise that the United States could not raise a regular army in any other mode than voluntary service of individuals to Monroe was “repugnant to the uniform construction of all grants of power” and to the first principles and “leading objects” of the Constitution.

used to argue against the right to raise regular troops by draft, Monroe thought it suggested the opposite-the power of the federal government over the militia had been limited while the power for raising regular armies was granted without limitation.¹⁴⁰ Monroe also did not believe drawing men from the militia into the regular army under federal officers violated the Constitution's requirement that militia be commanded by state-appointed officers. He thought that because drafted citizens would not be drawn from the militia, but from the population of the country, conscription treated them as if they had enlisted voluntarily. If the United States could not form regular armies from the whole population, they could raise no army.

Even before Madison's call for conscription, the British occupation of Maine and blockade of the coast under the December 1813 Embargo bill deepened New England dissent.¹⁴¹ In early 1814, at least forty towns called for a New England anti-war convention to seek remedies for the unconstitutional abuses of the federal government.¹⁴² The attempts by the federal government to raise new war loans in April and July hastened New England opposition, especially once the British extended their blockade of the ports of New England in June.¹⁴³

¹⁴⁰ *Ibid.*, 322. Theodore Dwight, in his accounting of the convention, made clear his criticism of Monroe's plan. His arguments previewed constitutional conservative responses in 1863. His argument, thus, focused on the threat conscription posed to the original system of federalism and constitutional tradition. Conscription was founded upon the basis of "arbitrary power in the national government over the militia of the states" with voluntary enlistments "entirely discarded" in favor of arbitrary and despotic power. *Ibid.*, 323-25. The militia belonged to the people or the state governments for their use and protection, which they had never surrendered to the general government. Congress only held a "special concurrent authority" over the militia in cases specified by the Constitution. *Ibid.* 326. Madison's latitudinarian understanding of federal power would allow for an "unqualified grant of power" with no exceptions.

¹⁴¹ William Edward Buckley, "The Hartford Convention," in *Tercentenary Commission of the State of Connecticut Committee on Historical Publications: The Fundamental Orders of Connecticut* (New Haven: Yale University Press, 1934), 5-6.

¹⁴² Wilentz, *Rise of American Democracy*, 162. Tensions rose as well when General Thomas Cushing clashed with Connecticut Governor John Cotton Smith, who replaced Griswold in October 1812. Smith assigned a major general to control the state's militia when called out to protect New London and when the militia refused to follow Cushing's orders, he cut off supplies to the militia and declared them withdrawn from federal service. Similar clashes played out in Massachusetts and Rhode Island. Massachusetts Governor Caleb Strong asked for compensation from the federal government in September, to which James Monroe responded that the measures were adopted "by a state Government for the defense of a State" and thus were not those of the United States. Skeen, *Citizen Soldiers*, 147.

¹⁴³ William Edward Buckley, "The Hartford Convention," 6.

During the fall of 1814, Bostonians expected an attack at any time and blamed the federal government for failing to protect them.¹⁴⁴ In October, the Massachusetts legislature convened a special session to both pass measures for its protection and to call for a convention and Governor Strong called for five thousand militia to protect the state.¹⁴⁵

After Monroe's plan was made public, the Connecticut Assembly passed a resolution stating that the plan was "utterly subversive of the rights and liberties of the people of this state, and the freedom, sovereignty, and independence of the same, and inconsistent with the principles of the Constitution."¹⁴⁶ By December, the New England states met for a convention in Hartford as many talked openly of secession and a separate peace with the British. Historians are divided as to whether the convention's aim was disunion, defense of the region, or moderation of the party's anti-war rhetoric.¹⁴⁷ The Hartford Convention issued a report of the December 15 to January 5th proceedings largely authored by stalwart Federalist Harrison Gray Otis, nephew of

¹⁴⁴ LaCroix, "A Singular and Awkward War," 19.

¹⁴⁵ Theodore Lyman, *A Short Account of the Hartford Convention, Taken from Official Documents* (Boston: O. Everett, 1823), 5-7 With Massachusetts threatened, Governor Strong and the state house passed a resolution to raise 10,000 men to protect the state before passing a October 16 resolution supporting a convention of the New England states by vote of 226-67; Harrison Gray Otis, *Otis' Letters in Defense of the Hartford Convention and the People of Massachusetts* (Boston: Simon Gardner, 1824), 10-11 Otis argued in his letters years later that the vote of the state legislature was proof that popular sentiment was firmly behind the convention.

¹⁴⁶ Dwight, *History of the Hartford Convention*, 336-37 It was the duty of the legislature of Connecticut to "exert themselves to ward off a blow so fatal to the liberties of a free people."

¹⁴⁷ See Alison L. LaCroix, "A Singular and Awkward War: The Transatlantic Context of the Hartford Convention," 1 *American Nineteenth-Century History*, Vol. 6 (2005), 5-7 LaCroix argues that "Most historians have treated the convention as an example of New England parochialism, viewing it as the hobbyhorse of a fringe group of reactionary Anglophiles, or more charitably, as the last grasp of eighteenth-century elitist Federalism before the advent of the more democratic Jacksonian era" rather than understanding it as a political act to address transatlantic alliances; James M. Jr. Banner, *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts* (New York: Alfred A. Knopf, Inc., 1969) Banner finds that no convention member "ever seriously contemplated disunion as an alternative in 1814"; Donald R. Hickey, "New England's Defense Problem and the Genesis of the Hartford Convention," 4 *New England Quarterly*, Vol. 50 (1977), 587-88 Hickey states that James Banner and others are correct that the convention was called to deal with constitutional issues and insure moderate control of the party, but they also had more pressing concerns-defense of New England; Melvin Urofsky & Paul Finkelman, *A March of Liberty: A Constitutional History of the United States Volume One: From the Founding to 1890* (New York: Oxford university Press), 212 Urofsky and Finkelman argue that although there were extremists like Timothy Pickering who wanted to secede, moderates in control secured resolutions reminiscent of Madison's Virginia Resolutions; William Edward Buckley, "The Hartford Convention," 25 Buckley argues that the "moderation of the report was a disappointment to the extreme Federalists" who had desired secession, as the Convention's report brought a "virtual end to the wild talk" which preceded it.

Mercy Gray Otis and judge of the court of common pleas. As historian Sean Wilentz observes, much of the document “recited New England’s familiar wartime grievances-the conscription of state militiamen, the inequitable political power of the slaveholding states” and proposed seven “essential” constitutional amendments as a nonnegotiable demand.¹⁴⁸

The report of the Convention reflected the gravity of the threat of Monroe’s conscription bill to New England Federalists.¹⁴⁹ As the preliminary committee report on December 20th states, the Conscription Bill in Congress was involved “still more alarming claims to infringe the rights of states” than the attempts by the President to interfere with state power.¹⁵⁰ Broadly, the Convention felt the novel system of conscription was “odious” and “alarming” and clearly worked against a government of enumerated, limited powers.¹⁵¹ Specifically, they focused on the “*into the actual service of*” language in Article I and II as applied to federal power over the militia. If the specified exigencies in Article I were ignored, the prospect of executive tyranny arose, as the limitations on the power would be “nothing more than merely nominal” against executive infallibility.¹⁵² Further, the report rejected the arranging the United States into military districts under the Monroe Plan, seeing it as creating a standing army. To allow for such abuse of power to change the Constitution would be to “perpetuate the evils of Revolution” by ignoring

¹⁴⁸ Wilentz, *Rise of American Democracy*, 166. The amendments included the repeal of the three-fifths clause, a requirement that two-thirds of both houses of Congress agree before admitting new states, limits on the duration of embargoes, and eliminating the election of a president from the same state to successive terms.

¹⁴⁹ See Alison L. LaCroix, “A Singular and Awkward War,” *American Nineteenth-Century History*, 21-22. She asserts that “despite its moderate veneer,” the report did not “disguise the resolve of the convention members,” as the report noted that the federal government’s strategy for raising an army showed a “total disregard for the Constitution” and argued a state could opt out of the cooperative structure of the Union to undertake collection of revenue and provide for defense; Lyman, *A Short Account of the Hartford Convention*, 25-26. On December 16, the Convention decided what subjects were appropriate for consideration, listing among others the bill before Congress providing for classing and drafting the militia, the power of the President to unilaterally call out the militia, and the complaint that the federal government failed to provide for a common defense.

¹⁵⁰ Lyman, *A Short Account of the Hartford Convention*, 29 (recommending that states pass decisive measures to protect the states and militia from the usurpation represented by conscription).

¹⁵¹ Proceedings of a Convention of Delegates, 8.

¹⁵² Dwight, *History of the Hartford Convention*, 357-58.

the explicit constitutional limitations on federal power over the militia.¹⁵³ The Convention argued that despite these “plain and precise limitations” in the Constitution, Congress now claimed a power that would render “nugatory the rightful authority of the individual states over that class of men” and put the lives and service of the people at the pleasure of the national government, enabling the destruction of liberties while fermenting military despotism. The Convention believed it was a duty of state governments to watch over the “rights reserved, as of the United States to exercise the powers which are *delegated*.”¹⁵⁴ Such language would become a staple of the objections of constitutional conservatives in 1863.

Additionally, the Convention found no law or constitutional grant of power allowed for the arranging of the United States into military districts under a standing army with the power to call forth the militia transferred to the President. Congress could delegate to the President the power to call forth the militia in cases within their jurisdiction, but the President could not substitute military prefects throughout the Union under their own discretion. To do so was a “manifest evasion” of the Constitution’s express reservation to the states of appointment of the officers of the militia.¹⁵⁵ The Convention also complained about the attempted conscription of naval men and the enlistment of minors without the consent of parents, which worked against state laws and local laws and was “repugnant to the spirit of the Constitution.” The effect was the destruction of one of “most important relations in society” and the giving to the President and

¹⁵³ Proceedings of a Convention of Delegates, 6.

¹⁵⁴ *Ibid.*, 7; William Edward Buckley, “The Hartford Convention,” 19 (noting that the states were “urged to uphold their authority against encroachment by the national government, to protect the rights of their citizens, and to prevent the administration from building a military despotism upon the ruins of the liberties of the people.”).

¹⁵⁵ Proceedings of a Convention of Delegates, 8 (Using the power to “raise armies” in such a way was a “flagrant” attempt to “pervert” the clause in a way inconsistent with the rest of the Constitution.). The Convention went further and objected to Congress’s claimed power to divide the militia of the States into classes through the draft. A claim to draft the militia for one year for general purposes was no limitation to the claim of power. The power of Congress to conscript and the President to decide “conclusively upon the existence and continuance of the emergency” would convert the militia as a whole into a standing army at the will of the President.

Congress “complete control of the rules in society.”¹⁵⁶ The convention did not only attack conscription, as they also questioned the federal defense of New England, charging that the Madison administration desired to conquer Canada, while complaining that New England should not continue to pay taxes to a bankrupt government that left them unprotected, calling for a return from federal control in order to restore commercial and artistic prosperity. Once more, usurpation of state power in favor of centralization seen as the road to despotism.

The convention, however, failed to achieve its mission. After adjourning on January 4, the convention adopted its final report on January 12, 1815. A month later, Governor Strong sent a three-man commission to present a summary of the convention’s grievances to President Madison. By the time they reached Washington on February 14th, they realized the war was over-the Treaty of Ghent had been signed weeks before unbeknownst to its commissioners on Christmas Eve.¹⁵⁷ As a result, the fiery New England anti-war movement now became such an embarrassment for the Federalist Party it essentially ended the party. According to legal historian Alison LaCroix, the Federalists were left with the “taint of treason,” as even though the “ostensibly moderate report” had curbed the “most extremist Federalist rhetoric,” it also advocated for regional autonomy.¹⁵⁸ Still, the rhetoric of the Convention along with New England’s political and judicial leadership would eventually be resurrected in 1863 during the debates over conscription. In the public constitutional debate in 1863, the War of 1812 precedent was notably divisive, as constitutional conservatives saw Federalists as the forebears of their

¹⁵⁶ *Ibid.*

¹⁵⁷ Wilentz, *Rise of American Democracy*, 166.

¹⁵⁸ LaCroix, “A Singular and Awkward War,” *American Nineteenth-Century History*, 23. William Buckley argued that the calling of the convention was the “final blunder which led to the disappearance” of the Federalist party from the American political scene. William Edward Buckley, “The Hartford Convention,” 29.

constitutional opposition, while Republicans and other supporters of conscription equated the Hartford Convention to nullification and even secession.

In the nearly five decades between the War of 1812 and Civil War, federal conscription was seldom mentioned. The two major Supreme Court cases which touched on the militia power—*Houston v. Moore* and *Martin v. Mott*—answered questions about the extent of federal power but said nothing about conscription.¹⁵⁹ The major military conflict of the period, the Mexican-American War, was fought by a volunteer army. As noted earlier, historian Peter Guardino observes that during the Mexican-American War, volunteer soldiers were preferred not only due to the attachment to citizen soldiers, but because Americans lacked trust of the regular army, which was seen as a last resort of desperate laborers.¹⁶⁰ Thus, conscription was never considered during a war mostly fought by volunteers. Instead, slavery was the area in which the reach of the federal government greatly expanded in the antebellum period. Both the Fugitive Slave Act of 1850 and the Supreme Court's decisions in *Prigg v. Pennsylvania*, *Dred Scott*, and *Ableman v. Booth* nationalized the protection of property rights over slaves. Many northern citizens actively resisted these changes and saw state courts as one of their best avenues for

¹⁵⁹ Both cases dealt with interpreting the Militia Act of 1795. *Houston v. Moore*, issued in 1820, dealt with a 1814 Pennsylvania statute enacted in support of the Militia Act of 1795 to penalize militiamen who neglected or refused to serve under the relevant federal law. The question was “whether the act of the legislature of Pennsylvania, under the authority of which the plaintiff in error was tried, and sentenced to pay a fine, is repugnant to the Constitution of the United States.” *Houston v. Moore*, 18 U.S. 1, 8-9 (1820). Justice Story's dissent in *Houston* proved more consequential to the 1863 debates. Story felt it was “almost too plain for argument” that the power given to Congress over the militia was of a “limited nature” and confined to objects specified in the clauses, such that for all other purposes, the state controlled. *Ibid.*, at 49-51 (Story, J., dissenting). However, once the state militias were properly called out under the exigencies listed in Article I, to presume states maintained authority to govern their own militias was “utterly inconsistent with unity of command” necessary to military operations. *Ibid.*, at 53. The primary question in *Martin* was whether the executive had sole authority to determine under the act the number of the militia “most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion” was constitutional. The Court decided the power belong exclusively to the President under the “Take Care” clause of Article II. Otherwise, the case asked statutory questions related to the Militia Act of 1795 and the proper proceedings of a court-martial. In his majority opinion, Justice Story did not deny that the Militia Act of 1795 was “within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place.” *Martin v. Mott*. 25 U.S. 19, 29 (1827).

¹⁶⁰ Peter Guardino, “Gendering, Soldiering and Citizenship,” 26-27.

redress. In 1863, constitutional conservatives complained that conscription allowed the federal government to improperly force citizens to act-to enroll in the army-while usurping the power of the states. Part of their struggle was to maintain the power of state courts to take petitions for writs of *habeas corpus* for release from federal detention under the Conscription Act. The seeds of the battle over state *habeas* jurisdiction to protect individual citizens against an encroaching federal government was sown in the 1850s.

The Fugitive Slave Act, Ableman v. Booth, and State Court Habeas Jurisdiction

The constitutional battles in the 1850s over the Fugitive Slave Act ultimately centered around whether state courts could properly release fugitive slaves or their white rescuers on writs of *habeas corpus*. The issue of state court jurisdiction was one of the constitutional issues that arose in 1863 with the passage of conscription which felt familiar. The Fugitive Slave Act of 1850 was one of the pivotal events which ultimately led to the Civil War. As Eric Foner writes, the “Fugitive Slave Act of 1850 embodied the most robust expansion of federal authority over the states, and over individual Americans, of the antebellum era. It could hardly have been designed to arouse greater opposition in the North. It overrode numerous state and local laws and legal procedures and commanded individual citizens to assist, when called upon, in rendition. It was retroactive, applying to all slaves who had run away in the past, including those who had been law-abiding residents of the free states.”¹⁶¹ The act saw the white south, typically defenders of local rights and antebellum federalism, favoring vigorous national action, while some northern states engaged in the nullification of federal law.¹⁶² The Fugitive Slave Act of 1850 established federal commissioners with the authority to require private citizens to pursue fugitives as well as

¹⁶¹ Eric Foner, *Gateway to Freedom: The Hidden History of the Underground Railroad* (New York: W.W. Norton & Co., 2015), 125.

¹⁶² *Ibid.*, 25.

granted the jurisdiction to commissioners to issue certificates of removal for fugitive slaves while overriding local laws. Significantly, there was no allowance for jury trial and no defenses permitted, such that the commissioners were limited to determining the identity of the person being returned rather than whether they were in fact a fugitive.¹⁶³ Thus for many Northerners, the act was problematic because it preempted the personal liberty laws of their states.

After the passage of the act, abolitionist sentiment was strong enough in Wisconsin during the events of *Ableman* that an antislavery convention urged defiance of the Fugitive Slave Act up to state nullification of federal law.¹⁶⁴ The case of *Ableman v. Booth*, as historian Timothy Huebner asserts, placed antislavery public opinion in Wisconsin against the “proslavery constitutional order.” Before *Ableman* reached the Supreme Court in 1859, the original case would come before the Wisconsin Supreme Court more than once, as the Federal government worked to successfully indict Sherman Booth for aiding a fugitive slave. In that time, the Supreme Court issued its *Dred Scott* ruling on March 6, 1857 revoking the citizenship of African-Americans and pushing the country closer to civil war. The combination of *Dred Scott* and *Ableman* secured slavery’s foothold nationally, as *Ableman* not only denied state court *habeas* jurisdiction to release fugitive slaves within their states whom had acquired freedom under state law, but upheld the Fugitive Slave Act of 1850 as constitutional.

The events leading to *Ableman* began on March 10, 1854, when a cadre of men stood outside fugitive slave Joshua Glover’s cabin. Slaveowner Benammi Garland held a certificate of removal, giving him authority to take hold of the fugitive Glover to present him before a federal

¹⁶³ Alfred L. Brophy, “Utility, History, and the Rule of Law: The Fugitive Slave Act of 1850 in Antebellum Jurisprudence,” in *Transformations in American Legal History: Law, Ideology, and Methods: Essays in honor of Morton J. Horwitz, Volume II*, ed. Daniel W. Hamilton & Alfred L. Brophy (Cambridge: Harvard University Press, 2009), 110.

¹⁶⁴ Timothy Huebner, *Liberty & Union: The Civil War Era and American Constitutionalism* (Lawrence: University of Kansas Press, 2016), 108.

judge or commissioner in Wisconsin.¹⁶⁵ When the arrest party brought Glover through Milwaukee, local abolitionists had already been alerted to their presence and set off for the county jail where Glover was held. The crowd was particularly stirred up by the handbills of Sherman Booth, who asserted that slave catchers had kidnapped Glover and planned a secret trial to deny Glover his rights.¹⁶⁶ Thousands turned out, including Milwaukee's acting mayor and the city marshal, and eventually, the crowd rushed the jail, freed Glover, and helped him escape to Canada. With Glover in Canada, the federal government turned to the criminal penalties available under the Fugitive Slave Act for interfering with its enforcement. Booth, the most vocal abolitionist and printer, was the focus of the government's prosecution.¹⁶⁷ Multiple legal actions followed, as Garland sued Booth for the value of his escaped slave and sued United States Marshal Stephen Ableman. Meanwhile, the Racine County district attorney sought Garland's arrest for violating the peace, and the Milwaukee sheriff served Marshal Ableman with a writ of *habeas corpus* commanding him to take Booth before a state judge to explain the reasons for his detention.¹⁶⁸

After federal commissioner Winfield Smith ordered Booth held on bail for suspicion of violating federal law in March, Booth had his bailsman surrender him to federal authorities to test the constitutionality of the underlying act. In order to do so, he petitioned Justice Abram D.

¹⁶⁵ H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (Athens: Ohio University Press, 2006), 1-2. If he satisfied the low threshold for evidence, under the Fugitive Slave Act of 1850, Garland could take Glover back to Missouri. Going beyond this, Garland sought a warrant from District Court Judge Andrew Miller and set off with two deputy U.S. marshals to apprehend Glover. *Ibid.* at 2.

¹⁶⁶ *Ibid.*, 6-9. Booth was aided by Byron Paine, son of James Paine, who founded the Ohio Liberty Party with Salmon P. Chase, who tried to secure a writ of *habeas corpus* for Glover. Paine spoke to the crowd, telling them that the Fugitive Slave was unconstitutional because it denied the writ and right to trial by jury. *Ibid.* at 16-19.

¹⁶⁷ *Ibid.*, 80.

¹⁶⁸ *Ibid.*, 83-85. The federal marshal Stephen Ableman complied with the writ, but upon his return, denied the state court had any power through *habeas corpus* to hold authority over federal prisoners. In the Racine case, Federal District Judge Andrew Miller ruled that under the Fugitive Slave Act, federal marshals or slave owners had the right to employ violence, even murder, in pursuit of a fugitive.

Smith of Wisconsin Supreme Court for a writ of *habeas corpus*. Incredibly, Booth not only won his freedom, but also a declaration from Judge Smith that the Fugitive Slave Act was unconstitutional. Before Smith, Byron Paine argued that the Fugitive Slave Act was unconstitutional because Congress had no power to legislate on the subject, that the statute subverted due process by denying alleged fugitive slaves the right to a jury trial, and that court commissioners under the act were unconstitutional judicial officers.¹⁶⁹ Paine borrowed heavily from the antislavery activists' arguments circulating at the time, most prominently future Chief Justice Salmon Chase. As legal historian H. Robert Baker notes, all three of Paine's arguments rested on the doctrine of state sovereignty—the notion that the national government was one of limited powers which could not usurp state powers unless they were specifically delegated to it under the Constitution.¹⁷⁰ Significantly, Paine felt that the doctrine was “not denied in theory by any one” and thus, broadly accepted. He cited both the Virginia and Kentucky Resolutions alongside Madison's “Report of 1800” to support the concurrent right of states to decide when the federal government had encroached on a state's sovereign authority.¹⁷¹ Finally, Paine interpreted Chief Justice John Marshall's opinions in *McCulloch v. Maryland*, *Dartmouth College*, and *Gibbons v. Ogden*, all of which supported broad federal power, to not interfere with the police powers of the states, including matters properly under the jurisdiction of state courts.¹⁷² Smith granted the writ in a May 26th decision, accepting all three of Paine's

¹⁶⁹ *Ibid.*, 117.

¹⁷⁰ By 1857, after their failures in the fall 1856 elections, Wisconsin Republicans had “forcefully announced their espousal of states' rights and popular constitutional resistance in party causes,” including their support for Judge Whiton's reelection. *Ibid.*, 148.

¹⁷¹ *Ibid.*, 118. Baker notes that it was this case and oral argument that marked the emergence of Paine as the “leading lawyer in Wisconsin's antislavery cause” and chiefly through the argument itself, which was circulated among Northern abolitionists. *Ibid.*, 119. Both Paine and Judge Smith were quick to caution citizens that only good faith calls to state courts to interpose themselves were acceptable—they could not test any law they disliked or invent “fictitious imprisonment” to test a law. *Ibid.*, 121.

¹⁷² *Ibid.*, 126.

arguments. He agreed that no “one department of the government is constituted the final and exclusive judge of its own delegated powers” and argued that if given such power, the Supreme Court would render state courts and sovereignty nugatory, as such an “[i]ncrease of influence and patronage on the part of the Federal Government [would] naturally lead to consolidation, [and] despotism.”¹⁷³

When the Wisconsin Supreme Court upheld Judge Smith’s decision in *Ableman v. Booth* to grant Booth’s writ of habeas corpus, Chief Justice Edward Whiton’s majority opinion accepted Paine’s emphasis on state sovereignty doctrine, saying, “It will not be denied that the citizens of the state naturally and properly look to their own state tribunals or relief from all kinds of illegal restraint and imprisonment.”¹⁷⁴ State courts could properly determine whether the imprisonment was legal and inquire into whether they properly held jurisdiction over the matter. Whiton followed Paine and Smith’s emphasis on a strict interpretation of the Constitution, arguing that Article III prohibited Congress from investing judicial power in any department outside the judiciary.¹⁷⁵ However, Whiton circumvented Paine’s argument that Congress had no right to legislate at all upon slavery, instead emphasizing that the Fugitive Slave Act violated due process by infringing on the right to a jury trial. Still, at this stage, the Wisconsin Supreme Court would not restrain the warrant issued by Judge Miller and the grand jury indictment.

The federal government was so astonished by Smith’s ruling that United States District Attorney John Sharpstein was granted permission by Attorney General Caleb Cushing to hire

¹⁷³ In *Re Booth*, 3 Wis. 1, 23-25 (1854); Jeffrey Schmitt, “Rethinking *Ableman v. Booth* and States’ Rights in Wisconsin,” *Virginia Law Review*, Vol. 93 (2007), 1332-33 (Schmitt argues that Paine and Smith were both proponents of a “unique theory of federalism” closer to Calhoun’s nullification, going beyond Chief Justice Spencer Roane’s co-equal sovereigns theory since they asserted state courts held superior power over the Supreme Court).

¹⁷⁴ Baker, *The Rescue of Joshua Glover*, 119-120.

¹⁷⁵ *Ibid.*, 123.

special counsel at federal expense.¹⁷⁶ Events returned to Federal District Judge Miller, who empaneled a grand jury to investigate crimes against the federal government, indicting Booth along with three others for aiding and abetting the escape of a fugitive slave in federal custody. Once juries found Booth and fellow defendant John Ryecraft guilty in November 1854 and January 1855, on February 3, 1855, the Wisconsin Supreme Court unanimously released both from imprisonment in *U.S. v. Booth*.¹⁷⁷ All three judges-Smith, Whiton, and Crawford-wrote separate opinions, but agreed the conviction rested on defective indictments and state courts could constitutionally interpose themselves when federal courts illegally detained citizens of their state.¹⁷⁸ In his concurrence, Abram Smith suggested that the defective indictment made the federal process illegitimate, meaning the prisoners were owed a discharge. He pointed to the state's fundamental law and constitution, arguing that the state government had a duty and the power to protect its own citizens as part of the American federal system. Whatever powers not delegated to a limited sovereignty remained with the original state sovereigns.¹⁷⁹ Quickly thereafter, the United States Supreme Court agreed to hear both *Ableman v. Booth* and *U.S. v. Booth*. They would not announce an opinion for another four years, when Chief Justice Taney reversed both decisions on March 7, 1859.¹⁸⁰

¹⁷⁶ *Ibid.*, 94.

¹⁷⁷ *Ibid.*, 129-130.

¹⁷⁸ In so doing, Smith refused to follow the Supreme Court precedents of *Martin v. Hunter's Lessee* and *Prigg v. Pennsylvania*, following the "compact theory" which held state courts could reject the constitutionality of federal statutes within their borders. Ann Woolhandler & Michael Collins, "The Story of Tarble's Case: State Habeas and Federal Detention," *Federal Court Stories* (August 11, 2009) 5-6, available at SSRN: <https://ssrn.com/abstract=1447422>.

¹⁷⁹ Baker, *The Rescue of Joshua Glover*, 131-32. Baker refers to these arguments as "revolutionary kernels within this decision," as both Whiton and Smith referenced Jefferson and Madison for interposition, citing and quoting from the Virginia and Kentucky Resolutions.

¹⁸⁰ *Ableman v. Booth*, 62 U.S. 506, 512-13 (1859) Taney explained the lengthy delay, noting that he had issued a writ of error to the Wisconsin Supreme Court in December 1855 and no return was made. Attorney General Caleb Cushing filed an affidavit in February 1856 that the writ of error had been duly served on the clerk of the Wisconsin Supreme Court and that one of the just "had directed the clerk to make no return to the writ of error, and to enter no order upon the journals or records of the court concerning the same." The next February, Cushing moved for leave to file the certified copy of the record of the Supreme Court of Wisconsin and on March 6 1857, the

Chief Justice Roger Taney's unanimous opinion tersely denied that state courts possessed any power to challenge the Supreme Court and asserted under the Supremacy Clause, federal judicial supremacy "constituted an essential element of the supremacy of the national government."¹⁸¹ In the words of Timothy Huebner, it was one of the "most nationalistic rulings in Supreme Court history" that came down "wholly on the side of federal judicial authority" and the ruling effectively meant neither Booth or the Wisconsin Supreme Court could interfere with enforcement of the fugitive slave law by writs of *habeas corpus*. According to Taney, state courts lacked jurisdiction to proceed once the federal marshal apprised the state court that his prisoner was held under the authority of the United States. He found that state and federal governments operated in independent spheres of sovereignty, and "the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye."¹⁸² If Wisconsin's decisions were allowed to stand, Taney believed state courts would hold the "same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offences against our revenue laws, or any other law intended to guard the different departments of the federal Government from fraud or violence."¹⁸³

Federal supremacy had to be supplemented by judicial power to enforce it and necessary to the independence and supremacy of the federal sovereignty was uniformity of law in all states.

same day Taney released his *Dred Scott* opinion, he ordered the copy of the record filed by the Attorney General to be received and entered on the docket of this court. The case was docketed but not reached for argument for two years.

¹⁸¹ Huebner, *Liberty & Union*, at 109.

¹⁸² Ableman, 62 U.S., 516.

¹⁸³ *Ibid.*, 514-515. Taney warned that if the Wisconsin Supreme Court's decision were upheld, it would not only led to conflicting state court interpretations of federal law, but "local tribunals could hardly be expected to be always free from the local influences of which we have spoken." *Ibid.*, 517-18.

As Taney concluded, “no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws.”¹⁸⁴ Generally, scholars have understood Taney’s opinion in *Ableman* to reflect his acceptance of the “dual sovereignty” understanding of federalism, which holds that both the state and federal governments derive their power directly from the sovereign people and act within their respective spheres directly on the people by their own instrumentalities.¹⁸⁵ Thus, Taney made clear that his ruling did not question the authority of state courts and judges authorized under state law to issue writs of *habeas corpus* in any case where the party is imprisoned within its territorial limits, “provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States.”¹⁸⁶ The error of the Wisconsin Supreme Court was to reverse and annul a decision of a federal district court.

Before the *Ableman* decision, legal historian William Duker notes that commentators, including Chancellor Kent and Rollin Hurd, considered it well-settled that state courts had authority to issue a writ of *habeas corpus* to inquire into the imprisonment of a federal prisoner held within its jurisdiction.¹⁸⁷ At the dawn of the Civil War, *Ableman* ran counter to most state court precedent which allowed state courts to issue writs of *habeas corpus* and discharge anyone

¹⁸⁴ *Ibid.*, 525. Taney elaborated that the framers anticipated disputes between the federal government and states and, “in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its courts shall extend to all cases arising under ‘this Constitution’ and the laws of the United States - leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution.” *Ibid.*, 520.

¹⁸⁵ Woolhandler & Collins, “The Story of Tarble’s Case,” 6-7; Michael Les Benedict, “Preserving Federalism: Reconstruction and the Waite Court,” Vol. 39, *Supreme Court Review* (1978), 45-46; Schmitt, at 1343.

¹⁸⁶ *Ableman*, 62 U.S., 523.

¹⁸⁷ William Duker, *A Constitutional History of Habeas Corpus* (Westport: Greenwood Press, 1980), 149; Rollin C. Hurd, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It: With A View of the Law of Extradition of Fugitives* 189-90, 190 n.1 (Albany, W. C. Little & Co. 2d ed. 1876).

underage.¹⁸⁸ But the consensus was limited to the principle that state courts could issue writs for federal prisoners *unlawfully* detained.¹⁸⁹ Thus, *Ableman* was a significant departure and many Northern state courts and judges reacted by either rejecting *Ableman* or minimizing its effects. Just months after *Ableman*, Ohio's Supreme Court issued a writ of *habeas corpus* for federal prisoners while inquiring into the constitutionality of Fugitive Slave Act. The case looked strikingly familiar and although the Ohio Supreme Court upheld the constitutionality of the act, it did so narrowly on a 3-2 vote with two dissenters prepared to agree with Wisconsin's *Booth* decision.¹⁹⁰ Even after the Supreme Court's decision, Ohio's highest court nearly followed Wisconsin's lead in asserting state sovereignty and concurrent jurisdiction.

Throughout the Civil War and especially in 1863, the issue of state court jurisdiction over writs of *habeas corpus* contesting arrest by federal officers acting under federal law

¹⁸⁸ As the 1814 precedent *Commonwealth v. Cushing* recognized, these were cases of personal liberty where "no argument was necessary" on many points and the Supreme Judicial Court of Massachusetts recognized the "obligation to do duty with the militia at home under officers generally deriving their commission from popular elections" or state authority. State courts could release underage soldiers from United States service by writ of *habeas corpus*. *Ibid.*, 170. In 1847, the Pennsylvania Supreme Court in *Commonwealth v. Fox* felt bound to protect individual liberty and discharge an underage soldier who stated by writ to be a deserter, affirming state court jurisdiction and concurrent jurisdiction. *Ibid.*, 71.

¹⁸⁹ C.C. Andrews, ed., *Official Opinions of the Attorneys General of the United States*, Vol. VI. (Washington: Robert Farnham, 1856), 106. As Attorney General Caleb Cushing's 1853 opinion found, the Supreme Court had not decided on the circumstances under which state courts could issue the writ and it was not "very clearly determined" in the state courts themselves. Pennsylvania, Massachusetts, New Hampshire, New Jersey and New York all had precedents in favor of state court jurisdiction, but these decisions were "limited to the special case of military enlistment" and "justified on the ground that a state cannot be deemed so far to have surrendered her independence as to be incapable of inquiring, through her tribunals, into the imprisonment of her citizens" by agents of the United States. Cushing anticipated *Ableman* in concluding that it was "against all reason" and had "never been pretended" that when a party was formally indicted before a United States court for a violation of federal law, the case could be withdrawn through the *habeas corpus* power of a state. *Ibid.*, 108-110. States could only issue the writ in case of persons *unlawfully* deprived of their liberty such that if a return showed good and sufficient cause for detention, the state court could not go beyond the return of a United States Marshal.

¹⁹⁰ Ex parte Bushnell, 9 Ohio St. 77, 184-85 (1859); Justice Milton Sutliff, a former Free Soil Senator and abolitionist, wrote that "The decision of the supreme court of a state, and indeed, the decisions of inferior courts of the several states... (are) final and conclusive... do not regard the Supreme Court of the United States as sustaining any other relation to this court than that of a co-ordinate court.... I do not recognize its decisions as those of a superior court." *Ibid.*, 317-18 (Sutliff, J., dissenting). Sutliff, like Smith, reference Madison and Jefferson's Kentucky and Virginia Resolutions and the Compact Theory, writing that, "The federal and the state governments are placed by the Constitution in this respect (the judiciary) on equal grounds. Neither is made superior to the other. Nor is either subordinate. Each is co-ordinate." *Ibid.*, 302.

remained contested. Federal and state courts struggled to discover the meaning of *Ableman v. Booth* and the extent of Chief Justice Taney's ruling. In a March 1863 case, *In Re Spangler*, the Michigan Supreme Court supported the understanding that *Ableman* precluded state court jurisdiction once they knew the petitioner was held by federal authority.¹⁹¹ Still, many state courts read *Ableman's* holding narrowly, concluding that they continued to possess the power to adjudicate habeas petitions filed by persons being held by federal officers without the backing of federal judicial process.¹⁹² For these judges, *Ableman* merely restated Taney's dual federalism. They focused on the second Wisconsin case, *U.S. v. Booth*, and argued that all *Ableman* did was to rule that state courts could not ignore a federal court order, since Sherman Booth had been convicted and imprisoned under federal judicial authority. In the eyes of these courts, the portions of Chief Justice Taney's opinion that extended beyond the facts of Booth's case were merely dictum. Moreover, these courts believed that if the Supreme Court had intended to denounce the longstanding practice of state court adjudication of habeas petitions filed by federal extrajudicial detainees, the Court would at least have acknowledged that practice's existence.¹⁹³

¹⁹¹ *In Re Spangler*, 11 Mich. 298, 304 (1863); *Ibid.*, 310 (Manning, J., concurring) (supporting a dual sovereignty interpretation that state and federal courts each have exclusive jurisdiction in habeas cases involving their own prisoners and could not interfere with their respective prisoners).

¹⁹² For instance, in the 1863 Indiana Supreme Court case *Griffin v. Wilcox*, Judge Perkins argued that, "Congress can neither force jurisdiction upon State Courts, nor take it from them. The Courts of Indiana do not derive their power to issue writs of habeas corpus from the General Government, nor can that Government take it from them. But the State Courts cannot extend their writs, when issued, into the domain of the General Government. Prisoners in custody, by authority of the General Government, must go to the Courts of that Government for relief; and if that relief is suspended, they are without relief from the State Courts for want of jurisdiction. The Federal and State Governments are distinct and sovereign within their respective spheres, and neither should be permitted to encroach upon the rights of the other." *Griffin v. Wilcox*, 21 Ind. 370, 385-86 (1863).

¹⁹³ Todd E. Pettys, "State Habeas Relief for Federal Extrajudicial Detainees," *Minnesota Law Review*, Vol. 92 (2007), 265, 285-86. Pettys cites several notable Civil War state court decisions. *Lanahan v. Birge*, 30 Conn. 438, 438-49 (1862) (adjudicating the habeas claim of a minor seeking release from military service); *Wantlan v. White*, 19 Ind. 470, 472-73 (1862) (granting habeas relief to a minor seeking release from military service); *Ex parte Anderson*, 16 Iowa 595, 598-99 (1864) (holding that state courts have the power to order minors released from invalid enlistment contracts, but declining to grant Anderson's petition because he had been arrested for desertion and was "awaiting his trial before a court martial"); *In re Disinger*, 12 Ohio St. 256, 257-63 (1861) (adjudicating the habeas claim of a minor seeking release from military service); *Shirk's Case*, 3 Grant 460, 461-64 (Pa. 1863) (holding that state courts generally "have power to discharge, on habeas corpus, minors who are held to service under invalid contracts of enlistment," but declining to grant Shirk's petition because federal judicial processes were

Wisconsin itself outright rejected *Ableman's* force. Following the decision, the state legislature passed resolutions that they regarded the decision "as an arbitrary act of power...and therefore without authority, void and of no force" and that the federal government under the Constitution "was not made the exclusive or final judge of the extent of the powers delegated to itself; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well as infractions, as of the mode and measure of redress."¹⁹⁴ Voters backed the legislature in the 1859 election, but the federal government soon arrested Booth once more. This time, Booth's appeal to the Wisconsin Supreme Court for a writ of *habeas corpus* failed. Incredibly, before Justice Dixon's decision was released, it was rumored that the federal marshals had called on the Milwaukee military companies for assistance if the court ordered Booth's release. Governor Alexander W. Randall, who had, in his inaugural address vowed to use the power of the state to enforce the Wisconsin court's decisions, telegraphed the state military companies with orders not to obey the federal authorities and to await his personal orders. Although such force was never used, Randall even sought authorization from the state legislature to use the state militia to protect the sovereignty of the state from "usurpation or aggression" by the federal government.¹⁹⁵ The Court's rejection of Booth's application ended the growing tension, but Wisconsin nearly saw a confrontation between state and federal military forces. The Civil War had not started, but the constitutional battles were already erupting.

underway); *Commonwealth ex rel. Bressler v. Gane*, 3 Grant 447, 456-57 (Pa. 1863) (narrowly construing *Ableman* as holding only "that when a person is held to appear and answer before a United States court, or when a person has been convicted before a court of the United States ... , the judgment cannot be reviewed and revised by a State court"); *Mann v. Parke*, 57 Va. (16 Gratt.) 443, 452 (1864) (granting habeas relief to a person seeking release from the Confederate army on the grounds of a statutory exemption); *In re Gregg*, 15 Wis. 479, 479-81 (1862) (adjudicating the habeas claim of a minor seeking release from military service).

¹⁹⁴ Schmitt, 1344.

¹⁹⁵ *Ibid.*, 1345-46.

Early Civil War Cases: Contesting the Militia Acts

Before the Conscription Act was passed in March 1863, state courts analyzed the power to conscript in cases arising out of earlier militia acts.¹⁹⁶ By July 1862, with the ejection of General McClellan's Army of the Potomac from the Peninsula by Confederate General Robert E. Lee's Army of Northern Virginia, the Union was struggling to raise sufficient volunteers. The Militia Act of 1862, passed on July 17th, was intended to both respect the volunteer tradition while forcing the states to provide Lincoln with the troops necessary to continue the war effort. It represented the North's first move toward national conscription and, as James Geary notes, "provoked intense discussion" because it was designed to help guarantee blacks emancipation in exchange for service in the army.¹⁹⁷ States maintained power over raising troops, but if they did not provide sufficient troops, the Lincoln administration now held coercive authority to intervene if necessary.¹⁹⁸ As historian Stephen Engle writes, the act was intended to "assist governors by keeping the recruiting system within state power" and by inspiring volunteerism with the threat of a draft, since Lincoln reserved the right to call into service all able-bodied militia men

¹⁹⁶ The case is not discussed in this dissertation, but the Connecticut Supreme Court addressed the Militia Act of 1861 in *Lanahan v. Birge* in February 1862.

¹⁹⁷ James W. Geary, *We Need Men: The Union Draft in the Civil War* (Dekalb: Northern Illinois University Press, 1991), 22-23 Many of the same Senators and Congressmen who would be key to the 1863 conscription spoke against the Militia Act, with Willard Saulsbury demanded an immediate roll call and John S. Carlile observing that only states possessed the power to determine the character of their militias on July 9th, when James Grimes of Iowa moved to enroll all men 18 to 45 and to authorize the President to organize black units. A week later, as the opposition died down, Pennsylvania's Charles Biddle proposed opening the measure to debate, while William S. Holman of India tried to table the bill, which failed 77-30. *Ibid*, 27.

¹⁹⁸ William C. Davis, *Lincoln's Men: How President Lincoln Became Father to An Army and a Nation* (New York: Simon & Schuster, 1999), 36 (Davis notes that the July 17, 1862 Militia Act was an "important precedent" because it represented the Union's first attempt at a draft. The weak response to the July call for volunteers spurred by the act made Lincoln willing to use the mandated draft if necessary, even if he preferred not to); Paul Quigley, "Civil War Conscription and the International Boundaries of Citizenship," 3 *Journal of the Civil War Era*, Vol. 4, 384 (2014).

between eighteen and forty-five for no more than nine months and the assign quotas to states.¹⁹⁹ Thus, while the bill did not create a national draft, it hung the threat over its citizenry.

Within weeks, on August 4, Secretary of War Stanton authorized a draft of 300,000 nine-month militiamen.²⁰⁰ Constitutional conservatives still saw the act as an illiberal measure counter to the American tradition of volunteering which created a new threat posed by the federal presence in local communities.²⁰¹ It was only made worse that it appeared to be in favor of the rich. Many Northerners feared the presence of provost marshals throughout the home-front. The provost marshal was the institution charged with the enrollment of men under the draft, dealing with desertion, and recruitment for state-based regiments.²⁰² In each Congressional district, the board of enrollment oversaw the work of the provost marshal in addition to arbitrating draft exemptions. Democrats depicted provost marshals, notes Robert Sandow, as “incompetent Republican lackeys” who abused their authority to “punish local political opponents.” Provost marshals administered both an unpopular government policy and used force to subdue resistance.²⁰³ Additionally, dissent was hastened by rising wartime inflation, as in areas like Clearfield, Pennsylvania, commodity prices shot up in some cases, like corn, 70 percent from 1861 prices.²⁰⁴ According to William Blair, the militia draft awakened resistance on the Union

¹⁹⁹ Stephen Engle, *Gathering to Save a Nation: Lincoln and the Union's War Governors* (Chapel Hill: University of North Carolina Press, 2016), 198; Geary, *We Need Men*, 27-28 noting that any actions by Lincoln to order drafts were “doubtful” because a “literal interpretation of the act left only the governors” with power to conscript, requiring state assistance to carry out the act.

²⁰⁰ Will Hickox, “Nine Months of Hell,” *New York Times*, September 12, 2012, available at: <https://opinionator.blogs.nytimes.com/2012/09/14/nine-months-of-hell/>

²⁰¹ *Ibid.* Robert Sandow writes that Democrats complained “bitterly” about the Militia Act. Robert Sandow, *Deserter Country*, 75.

²⁰² The Provost Marshal General's Bureau was created by another act of March 1863.

²⁰³ Sandow, *Deserter Country*, 75.

²⁰⁴ *Ibid.*, 76-77. In an issue that would later have constitutional ramifications concerning the extent of the state power to tax, conscription too came with the “excess of war taxes” and thus the “economic difficulty magnified the dissent over emancipation and conscription.” *Ibid.*, 78-79. Local Democrats blamed the high commodity prices on wartime speculators and the “ill effects of conscription,” with the editor of the *Clearfield Republican* denouncing “Lincoln Coffee.” *Ibid.*, 76. Conscription also raised the cost of farm labor and “impelled women to work in the

home front,” as the “Democratic enclaves that manifested early expressions of partisanship provided fertile ground for preaching against mobilization.”²⁰⁵

The War Department soon responded to this widespread opposition to the Militia Act. On August 8, 1862, Secretary of War Edwin Stanton issued an order to federal officers designed to enforce the Militia Act. Stanton’s order authorized civilian officials to arrest and imprison any persons who engaged “by act, speech, or writing, in discouraging volunteer enlistments” or giving “aid and comfort to the enemy” or “any other disloyal practice against the United States.” The same order also suspended *habeas corpus* for anyone arrested for disloyal practices and produced rounds of arrests throughout the North.²⁰⁶ The disorder in the north ultimately led President Lincoln to issue an order suspending *habeas corpus* on September 24, 1862.²⁰⁷ Notably, Lincoln’s September 1862 order suspending *habeas* argued that it had “become necessary to call into service, not only volunteers, but also portions of the militia of the states by draft, in order to suppress the insurrection.”

The Militia Act of 1862 did not bring the nearly same constitutional outcry in public or in the courtroom as the Conscription Act would the following year precisely because it largely built

fields,” such that Democratic editors blamed conscription and the Republican people for the potential erosion of the “noble housewife.”

²⁰⁵ William Blair, *With Malice Towards Some: Treason and Loyalty in the Civil War Era* (Chapel Hill: University of North Carolina Press, 2014), 167-68.

²⁰⁶ Stephen E. Towne, *Surveillance and Spies in the Civil War: Exposing Confederate Conspiracies* (Athens: Ohio University Press, 2014), 1847.

²⁰⁷ “Whereas, it has become necessary to call into the service not only volunteers, but a portion of the militia of the states by draft, in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary process of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection: Now, therefore, be it ordered: First, That during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commissions. Second, That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission.”

on existing statutory and Supreme Court precedent.²⁰⁸ In that context, the Wisconsin Supreme Court, with Sherman Booth's lawyer, Byron Paine, now among its justices, saw multiple challenges to the Militia Act of 1862. In the first case, *In Re Griner*, the application for a writ of *habeas corpus* of Frederick Griner and other citizens of Manitowoc County alleged that the state draft authorized under the Militia Act was "without color of legal authority under any statute or law of this state or of the United States, and altogether arbitrary and unlawful."²⁰⁹ In Justice Orasmus Cole's opinion for the court, Griner's application was denied because he believed precedent had already granted the federal government the powers objected to by the petitioners.

For Justice Cole, Congress's Article I powers to "raise and support armies," call forth the militia and provide for organizing, arming, and disciplining the militia were "clear and indisputable," with language "so plain, precise, and comprehensive, as to leave no room for doubt."²¹⁰ He recognized that the Militia Act of 1862 granted discretionary power in the President to execute the draft, but was unconvinced by Griner's separation of powers argument. The act could not grant legislative power to the President, but Cole stipulated there was a distinction between of "those important subjects which must be entirely regulated by the legislature itself, from those of less interest in which a general provision may be made, and power given to those who are to act under such general provision to fill up the detail." He saw the power given to the President to make all rules and regulations to carry into effect the law for calling out the militia of the latter character.²¹¹ Any applicable state law on the subject would not

²⁰⁸ 48 U.S. 1 (1848). The case arose out of disputes over the Dorr Rebellion in 1841 and 1842 and the power of United States Circuit Courts over the decisions of State entities over the constitutionality of their own state government. Chief Justice Taney proclaimed that "the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them" and that upon such a question, "the courts of the United States are bound to follow the decisions of the State tribunals." *Ibid.*, 40.

²⁰⁹ *In Re Griner*, 16 Wis. 423, 430 (1863).

²¹⁰ *Ibid.*, 431.

²¹¹ *Ibid.*, 433. To Cole, once the militia was called forth, "it was a matter of no vital importance how they should be detached and drafted."

be ignored or overridden, but the President was properly allowed by Congress to fill in any gaps in state law.

To Cole, this was in keeping with constitutional tradition. Giving discretion to agencies and departments to carry into effect the general provisions of federal law went back to the first Congress. It was “undoubtedly in strict conformity to the views entertained by the great statesmen of that day, of the genius and intent of the instrument which they had had such a great share in framing.”²¹² Congress had its choice as to the means deployed and under both the Militia Act of 1795 and 1862, the President was given wide latitude to call forth the whole military force of the country. Citing *Houston v. Moore*, Cole observed that Justice Washington must have considered the power to organize, arm, and discipline the militia when called out greater than the power to call out the militia since no draft existed during the War of 1812.²¹³ Thus, the President already had power under the 1795 act to detach, draft, call out the militia and the 1862 act did not confer any new or additional powers to object to.²¹⁴ The Wisconsin Supreme Court would not cause a collision with the Supreme Court again, at least not on the question of the proper scope of the militia power. It would, however, affirm its power to take writs of *habeas corpus* for federal prisoners.

In the same January term, the Wisconsin Supreme Court heard a case arising from the anti-draft rioting which spread to the Midwest. On November 10, 1862, Nicholas Kemp was

²¹² *Ibid.*, 434.

²¹³ *Ibid.*, 439-440 (quoting Washington’s reference to “provisions are made for drafting, detaching and calling forth the state quotas, when required by the president.”). He assumed that “Congress must have supposed that the president under that act had the power to draft and detach the militia, or it would not have referred to them in the terms it has in the act of 1814.” *Ibid.*, 441.

²¹⁴ *In Re Wehlitz* confirmed the ruling of *Griner*, noting that *Griner* already authorized the President to make “the necessary rules and regulations for drafting the militia in cases where the laws of the state had not made a sufficient provision for that purpose.” The remaining question was whether a state resident but native of a foreign country who had declared his intention to become a citizen of the United States and who had voted in that state was liable to be drafted. *In Re Wehlitz*. 16 Wis. 443, 445 (1863).

arrested for “violent interference with the draft of the militia at Port Washington” in Ozaukee County, including the “destruction of the boxes containing the names of those subject to draft, and personal violence to the commissioner duly appointed.”²¹⁵ Kemp was arrested under the authority of both Stanton’s August orders and Lincoln’s September suspension. On January 13, Chief Justice Luther S. Dixon ruled in the case of *In RE Kemp*, appearing to withhold the ability of federal officers from making arrests within the state of Wisconsin. Dixon began his opinion with a rather incredible statement, noting that it was his regret that “which I have always felt and which I feel now more than ever, that Congress has not, in the exercise of its undoubted power, withdrawn from the jurisdiction of the state courts, and committed to the exclusive decision of the federal courts, all cases arising under the Constitution and laws of the United States.” Dixon never mentions the *Ableman* case explicitly-nor did Smith or Cole-but appeared to be wary of repeating previous mistakes, noting that Congress’ failure to withdraw state court jurisdiction had led to several “perplexities” in the clash of jurisdictions and would inevitably lead to future “mistakes and possible prejudices of the state tribunals” and “serious embarrassments and most injurious delays in the exercise of proper federal authority.” Dixon was obliged to note that the court’s decision was preliminary and not final, as he anticipated and hoped the Supreme Court would provide the final answer on the questions before him.

Kemp asked both whether the President could suspend *habeas corpus* by order and whether he had the power to make criminal acts not criminalized by Congress. Dixon referred not only to knowledge of Chief Justice Taney’s opinion in *Ex Parte Merriman*, but to the pamphlet by former Supreme Court Justice Benjamin Curtis on executive power and the opinion

²¹⁵ *In Re Kemp*, 16 Wis. 359 (1863); 1863 Wis. LEXIS 9, 1.

of Justice Hall in New York in *In RE Benedict*.²¹⁶ Following Curtis, Dixon argued that “martial law is restricted to those places which are the theatre of war, and to their immediate vicinity.” If civil authority was sufficient to keep order and punish offenders, then military commanders had no jurisdiction but if “through the disloyalty of the civil magistrates or the insurrectionary spirit of the people, the laws cannot be enforced and order maintained, then martial law takes the place of civil law, wherever there is a sufficient military force to execute it.”²¹⁷ Ultimately, Dixon found that General Elliot had not shown sufficient cause to hold the petitioner or to refuse to produce his body upon the writ of *habeas corpus*, but Dixon also prayed for guidance from higher courts as to how to proceed, hoping the case would reach the highest court.

The two other Wisconsin justices hearing the *Kemp* case did not share all of Dixon’s concerns. Justice Cole understood that it was “impossible to overestimate the gravity and importance of the questions involved” in the case, as the “gravest issues” were now before their court.²¹⁸ Cole interpreted the Militia Act of 1862 with an explicit limit on the power of the federal government to conscript. Cole understood that the Militia Act did not “declare that the act

²¹⁶ Campbellite minister Judson D. Benedict preached in New York that the war was un-Christian and was arrested under Stanton’s August 8, 1862 order to arrest anyone giving “aid and comfort to the enemy.” Benedict applied for a writ of *habeas corpus* to United States District Judge Nathan K. Hall. Hall wrote and published as a pamphlet his long opinion that agreed with Chief Justice Taney that the President lacked the power to suspend the writ. Carl B. Swisher, *The Taney Period, 1836-1864* (Oxford: Oxford University Press, 1971), 920; *In RE Benedict*, 4 W.L. Monthly 449, 450 (1862).

²¹⁷ *In Re Kemp*, 16 Wisc. 369. Dixon continued, lamenting that he did not wish to criticize Lincoln and that he understood that his suspension of *habeas* was, “Penned at the gloomiest period of our public misfortunes, when over fifty thousand of the noblest of the land, answering the summons, had fallen a sacrifice to the cause of our nationality, when one division of the army of the Union, already most sadly repulsed, was threatened with complete overthrow by superior, almost irresistible numbers, and another, broken and wavering, was retiring before the restless and implacable foe- when the only way to national life, honor and peace, lay through the fire and blood of battle-and when, in response to a recent call for additional forces, instead of the utmost loyalty and patriotism on the part of every citizen of the loyal states, each asking where he could be most useful, or how he could best promote the welfare and safety of his country, there was reason to apprehend, in some quarters, factious and disloyal opposition-the proclamation in question is not a welcome subject of criticism.” *Ibid.*, 370.

²¹⁸ *Ibid.*, 71-72 (Cole, J., concurring). He agreed with Dixon that despite its high intentions, Lincoln’s September order was illegal, as he did not understand by what principles it could be maintained that the citizen who commits the crimes in question was liable to martial law without a clear violation of their Constitutional rights. It was the Constitutional power of Congress, not the President, to suspend the writ. *Ibid.*, 378.

of discouraging enlistments or resisting militia drafts shall subject a party to martial law and trial by court martial.” As he argued in *Griner*, only when there were “any defects in existing laws or in the execution of them in the several states” was the President authorized to make all necessary rules and regulations for the enrollment of the militia and for making the draft.²¹⁹ Under that discretionary power, the President could not subject a citizen to trial and punishment by court martial for resisting the draft.²²⁰ Cole’s argument implied that the President would be unable to enforce the Conscription Act of 1863 by military arrest and court martial.

The Wisconsin Supreme Court, led by Dixon, granted Kemp his writ while imploring the Supreme Court to resolve the issue. In so doing, with an opinion that never directly mentioned *Ableman*, the Wisconsin Supreme Court once again upheld its right to determine whether or not its own citizens were held legally by writ of *habeas corpus*. The Lincoln Administration was frustrated and deeply concerned. Bates starkly stated that if the question of *habeas* came before the Supreme Court, he feared it would rule against the administration. Such a decision would “paralyze the administration” and he discounted the chance the Supreme Court would rule favorably to the administration. Attorney General Edward Bates argued that, “knowing as we do, the antecedents and present proclivities of the majority of that Court (and I speak of them with entire respect) I can anticipate no such results.”²²¹ He believed Chief Justice Taney and Justice Nathan Clifford would undoubtedly rule against the administration and the rest of the Democrats would likely join them. Thus, Bates felt the administration was better off without a ruling. Just as Congress was about to take up national conscription in February, state courts

²¹⁹ *Ibid.*, 374-75.

²²⁰ Nor could the President claim to do so under his Article II “Commander-in-Chief” powers.

²²¹ David Silver, *Lincoln’s Supreme Court* (Urbana: University of Illinois Press, 1956), 124-25 Silver maintains that the result was that the administration “received vast criticism for acts of questionable constitutionality, but it preferred to incur that criticism rather than risk defeat” and this was a “tacit admission that certain deeds transcended the Constitution.”

continued to interfere with federal officers much to the chagrin of the Lincoln Administration. As Bates suggested, their policy became one of avoidance and using legislation to stay out of state court whenever possible. As constitutional opposition to conscription grew over the next year, the issue would come to a head again as challenges mainly came in state courts by writs of *habeas corpus*. State courts, as the experience of New York and Pennsylvania showed over the course of 1863, were more than willing to debate the meaning of *Ableman v. Booth* and many judges were ready to follow Wisconsin's lead in asserting the concurrent power to review the constitutionality of federal acts.

CHAPTER II: CONSTITUTIONAL CONSERVATIVES BATTLE CONSCRIPTION IN CONGRESS

In late January of 1863, in the wake of the Emancipation Proclamation and President Lincoln's September suspension of *habeas corpus*, Congressional Democrats reached a fever pitch in their opposition to the administration's war policies. On the 27th, Delaware Democratic Senator William Saulsbury Sr., reportedly drinking heavily, unleashed a vocal fiery upon Lincoln. He attacked the President for being a weak imbecile before Vice President Hannibal Hamlin asked him to take his seat. Saulsbury was arrested after refused to take his seat upon brandishing a pistol.²²² New Hampshire Senator Daniel Clark felt the actions appalling enough that he tried unsuccessfully to have Saulsbury expelled from the Senate. Such was the atmosphere when Henry Wilson introduced the Senate Bill 511 for enrolling and calling out the militia on February 14, 1863-what would soon be known as the "Conscription Act." The 37th Congress saw constant verbal jousting over the threats to the Constitution by Republican war policies. By the end of the debate over the Conscription Act, Republican Jacob Howard responded to Saulsbury's constitutional criticism with a threat to "come on and we will meet you in your civil war."²²³ The constitutional battles in Congress in February 1863 over the

²²² "Exciting Scene in the Senate-The President Denounced as an Imbecile-Senator Saulsbury Arrested," *Huntingdon Globe*, February 4, 1863, 1; "A Scene in the Senate," *Reading Gazette and Democrat*, Jan. 31, 1863, 2. Some in the Democratic press suggested that Saulsbury was sober and deliberate and well-dressed and merely spoke like a "bar-room rowdy." Wellsboro *Agitator*, Jan. 28, 1863, 2; Jonathan W. White, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* (Baton Rouge: Louisiana State University Press, 2011) (noting that Saulsbury denounced secession, but believed slavery should be preserved as a slaveholder, and boomed that if he could paint the portrait of a despot, he would "paint the hideous form of Abraham Lincoln").

²²³ *Congressional Globe* (hereinafter, "C.G."), 37th Congress, 3rd Sess., February 28, 1863, 1389. Saulsbury could not conceive how Howard thought he was making a threat, as he merely hoped for vindication against the "oppressive and unconstitutional legislation" through peaceful removal or an oppressed people determined to be free.

Conscription Act sometimes became personal and literal amidst the desperation on the part of constitutional conservatives to protect the Constitution—constitutional values were closely held enough to provoke emotional and visceral responses.²²⁴

Constitutional conservatives in Congress focused their objections to the Conscription Act on threats to federalism. Historians previously have viewed the debate over conscription in Congress in February 1863 as centering on personal liberties with arguments about federalism were treated as mostly a sideshow for constituents.²²⁵ This dissertation argues that federalism-based objections were the core of constitutional conservatives' arguments against conscription. Concerns over threats to separation of powers and civil liberties also animated constitutional conservatives, but their principal objection was that the Conscription Act usurped the powers of the states and granted the federal government unlimited power over military affairs. In so doing, it created what an "irresponsible despotism" and left no options to the people except resistance or "abject submission."²²⁶ To support their federalism-based arguments, constitutional conservatives looked to the shared American constitutional culture and the tradition of volunteerism over conscription to meet the nation's military needs. Constitutional conservatives tended to blame the Republicans' conversion of war for Union to abolition war for the lack of volunteerism that made conscription necessarily, but this was not part of their constitutional

²²⁴ As Joanne Freeman notes in her recent book, *Field of Blood*, although the Civil War Congress saw fewer episodes of violence, the volume of personal insults and attacks notably increased. See Joanne B. Freeman, *The Field of Blood: Violence in Congress and the Road to Civil War* (New York: Farrar, Straus, and Giroux, 2018), 269-270.

²²⁵ For instance, historians like James Geary feel that the intent of House Democrats was not to obstruct the ultimate passage of the Conscription Act but to safeguard certain rights and liberties and maintain party discipline on states' rights, the filibuster in the House and the content of the Democratic speeches reflects serious engagement on constitutional issues and the need to craft constitutional arguments to be shared with public even if they could not successfully block the legislation. Democrats could both maintain their position as the loyal opposition and engage in the public constitutional debate based on their serious concerns about the Conscription Act. James Geary, *We Need Men*, 54.

²²⁶ C.G., 1270.

critique but a broader objection to the move away from war for Union. Constitutional conservative voices differed significantly from more radical voices like Clement Vallandigham, who as Peace Democrats were more concerned with ending the war and any opposing all efforts of the administration than making well-considered constitutional arguments. Radicals tended to view arguments about personal liberties as being central, while constitutional conservatives viewed the need to save the Constitution's federalism structure as key.

Key constitutional conservative voices in Congress included Illinois Senator William Richardson, West Virginia Senator John Carlile, Delaware Senator James Bayard, Kentucky Unionists Robert Mallory and Charles Anderson Wickliffe, Ohio Congressmen Samuel S. Cox, Pennsylvania Congressman Charles Biddle, and New York Congressman John Benedict Steele. Each had a background as a lawyer and several-Steele, Mallory, and Powell-had extensive experience in the law. They all shared a focus on federalism-based objections to the Conscription Act while some, like Ohio representative George Hunt Pendleton, tended to be more radical voices who focused on attacking the arbitrary power grant to the provost marshal under the act. Even their attacks on arbitrary power were connected to the greater threat to federalism and the original constitutional structure which protected individual rights. Radicals discussed civil liberties more because they tended to have opposed Republican war policies from the beginning of the war and thus remained attached to the earliest war issues—*habeas*, arbitrary arrests and confiscation. More conservative representatives tended to think more systematically because they wished to remain supportive of the war broadly, but worried about the long-term constitutional effects of supporting conscription. As Kentucky Unionist Robert Mallory put it, he had never been an “ultra-States’ rights man,” but rather an ardent defender of the Constitution

and constitutional conservative who looked to uphold the limits of the federal government and protect the constitutionally guaranteed reserved rights of states.²²⁷

Moderate voices, including War Democrat Hendrick Wright of Pennsylvania and Michigan Republican Senator Jacob Howard, were concerned about the scope of federal power under the act, especially the inclusion of foreigners among “all able-bodied men” and the power granted to provost marshals to define treason arbitrarily. The notable politicians making constitutional arguments in favor of conscription included Pennsylvania Representative William Kelley, Massachusetts Senator Samuel Fessenden, and Massachusetts Unionist Representative Benjamin Franklin Thomas. They focused on using constitutional tradition and history to support national conscription by pointing to the experience of the War of 1812 and argued Congress’s powers under Article I and the “necessary and proper” clause were more than sufficient to support national conscription.

The first sustained public constitutional debate in the press began simultaneously with the February Congressional debate, as newspaper editors began to discuss the constitutionality of the bill they presumed would pass. The press actively watched and discuss the February debate, reflecting the significance of the act. Thus, by the time the bill was signed into law on March 3, 1863, constitutional conservatives were ready to mount a popular campaign against the law’s constitutionality. The March press debate that followed would draw from the ideas already presented by constitutional conservatives in Congress.²²⁸ Senators and representatives understood and expected their lengthy speeches on the floor of the Senate and House to be

²²⁷ *C.G.*, 1251.

²²⁸ Constitutional conservative opposition in the House tended to be more stringent than it did in the Senate partly because Republicans in the House tended to be more radical and because Senate Democrats avoid “fractious opposition on almost all measures” and acted as a reasonable opposition whom overwhelmingly tended to support war measures.”

broadcast to their constituents through friendly newspapers, pamphlets, and other printed mediums. As Senator James Bayard noted towards the end of the Senate debate, he felt it was his duty to state his objections to the Conscription Act.²²⁹ Even public displays of insult, like those between Saulsbury and Howard, were deemed critical for increasing support among constituents. Such combative speeches were given the idiom, “buncombe,” because these regular occurrences were the equivalent of “stumping for yourself in the House or Senate by making an inconsequential speech solely to please your constituents.”²³⁰ Through these often-lengthy speeches opposing the Conscription Act, constitutional conservative politicians choose to share primarily constitutional arguments with their constituents.

The Initial Senate Debate, February 4th-5th

Since the passage of the Militia Act in July 1862, much had changed both military and politically for the north. The military situation for the Union had worsened, as despite stopping Robert E. Lee’s invasion of the north at Antietam on September 17, General George McClellan was unable to secure a decisive victory. In December, General Ambrose Burnside, who replaced McClellan on November 5, lost over 12,000 men at the Battle of Fredericksburg on December 13, a “debacle” which devastated morale in the north. Meanwhile, the Democratic party had found electoral success in the fall, running on a platform opposing the Emancipation Proclamation and the violations of civil liberty caused by the Lincoln administration’s suspension of *habeas corpus* and use of martial law. In the wake of these failures, it was Secretary of Defense Edwin Stanton who worked behind the scenes to work for a national conscription bill, believing the militia draft

²²⁹ *Ibid.*, 1363. Notably, Bayard’s speeches were some of the most frequently reprinted in Democratic newspapers.

²³⁰ Rachel A. Shelden, *Washington Brotherhood: Politics, Social Life and the Coming of the Civil War* (Chapel Hill: University of North Carolina Press, 2013), 36. Speaking to buncombe was as much personal politics as it was party politics, if not more, and everyone did it, according to Shelden, as some congressmen even created bills and resolutions purely to energize their constituent. *Ibid.*, 37.

was problematic because of the frequent requests for postponement, the intransigence of state governors to enforce the draft, the untrustworthiness of civilian provost marshals, and the lack of uniformity of militia regulations among states.²³¹ Stanton had the support of the army, businessmen who resented the bounty system, and intellectuals like Francis Lieber, who thought national conscription was the most efficient means of raising an army.

Initial debate over the Conscription Act began on February 4th. Senator Henry Wilson, Chairman of the Committee on Military Affairs and abolitionist leader, introduced the first version of the Conscription Act, Senate Bill 493, on January 27th. The initial bill authorized the President to draft state militiamen for two years and impose penalties on individuals who hindered enlistments or supported deserters. Immediately, constitutional conservatives took issue with authorizing the President to enroll and draft state militiamen directly without state executive authority and to place them under military law.²³² Unionist Senator John Snyder Carlile of West Virginia was first to object on constitutional grounds, emphasizing its threat to antebellum federalism. Carlile's loyalty was not in doubt, as he had been a member of the Virginia Secessionist Convention who opposed secession as blatantly unconstitutional and defended the rights of Unionists before leading the Wheeling Convention in May 1861 pushing for separate West Virginia statehood.²³³ He argued that Wilson's proposal was of "very doubtful propriety" and "very doubtful constitutionality" because it proposed to put the entire militia of the states under the control of the President. Numerous constitutional conservatives would invoke the same

²³¹ Geary, *We Need Men*, 50-51.

²³² James W. Geary, "The Enrollment Act and the 37th Congress," Vol. 46, *Historian*, 4 (1984), 566-67.

²³³ Carlile was a lawyer before joining the Virginia state senate in 1847 as a Whig, later winning a House seat and supporting the nativists. See Jon L. Wakelyn, ed., *Southern Unionist Pamphlets and the Civil War* (Columbia: University of Missouri Press, 1999), 82; William C. Davis & James I. Robertson, eds., *Virginia at War, 1861* (Lexington: University of Kentucky Press, 2005) 4-10 Robertson describes Carlile as having the attributes of a hypocrite given that he was a slaveowner, but Carlile gave one of the longest speeches at the convention, accusing secessionists of wanting to "make war against the Constitution" and "destroy the work of our Revolutionary fathers."

argument going forward. Carlile immediately moved to strike both sections.²³⁴ He saw the proposed bill as a general conscription law which struck down the entire right of the states over their militia and ignored Article I by bypassing the states to give the President control over the entire military force of the states. Carlile was also first to invoke the image of despotism. Despotism meant to constitutional conservatives the replacement of the careful federalism of the Constitution with the absolute authority of the federal government under the President's command. This seemed more in line with the actions of the Confederate government. War needed to be waged constitutionally and not at the expense of federalism, as they were just as necessary as the federal government as parts of the "great whole."²³⁵

Illinois Democratic Senator William Alexander Richardson was the embodiment of constitutional conservatism as a staunch unionist who fiercely attacked Lincoln's war policies. At twenty-six, after a time as state attorney, he entered the Illinois House as a Jacksonian Democrat in 1837 where he served with Stephen Douglas and very quickly he made advancing Douglas' program his political goal.²³⁶ Following Douglas' loss in the 1860 election, Richardson followed Douglas' lead as a stalwart Unionist who opposed secession before replacing Douglas in the Senate upon his mentor's death in 1862. He concurred with Carlile that never had "fearful import" been introduced by Congress, as the Conscription Act conferred upon the President "absolute command" over the entire militia of the United States through sections two and four. As soon as they were enrolled, citizens were under the control of the President and the articles of war. Richardson introduced another key facet of constitutional conservative federalism-based

²³⁴ *C.G.*, 708.

²³⁵ *Ibid.*, 711.

²³⁶ David Kenney & Robert E. Hartley, *An Uncertain Tradition: U.S. Senators from Illinois, 1818-2003* (Carbondale: Southern Illinois University Press, 2003), 54-56. Richardson was the image of a rough pioneer politician, making his name as a lieutenant colonel in the Mexican War before winning Douglas' vacated Congressional seat in 1847.

arguments. Conscription worked against constitutional history and tradition. He asserted Congress had always assumed the power to pass laws to call soldiers into the field and was now granting the President more power “than belongs to any despot in Europe.” Richardson later complained he could not understand how an army of 800,000 required conscription when no European army had ever exceeded it. No necessity existed, he felt, for this “enormous power” and “dangerous experiment” which threatened the Republic itself.²³⁷ Richardson felt he had been challenged by his constituents to resist “these aggressions and assertions of power” against the Constitution. It was thus his duty to resist by all means the passage of the Conscription Act and his constituents made clear they expected opposition in the form of constitutional arguments.²³⁸

Delaware Senator James Asheton Bayard joined Carlile and Richardson in emphasizing federalism-based arguments in his objection to Wilson’s bill. Like Richardson, his political career began as a Jacksonian Democrat, having declined President Jackson’s appointment of Bayard as Director of the Bank of United States to accept an appointment as United States District Attorney before winning a Senate seat in 1851. He was seen by fellow Democrats as receiving his “political education from the founders and framers of the Republic and Constitution” who was unyielding in opposing Republican despotism.²³⁹ Bayard introduced two significant federalism-based arguments going forward. One, the Constitution treated the army and navy of the United States different from the militia. Congress had power to raise and support

²³⁷ *C.G.*, 1386.

²³⁸ *Ibid.*, 710.

²³⁹ “Senator Bayard,” *The Old Guard*, Vol. 1, no. 5 (May 1863), 120. Bayard came from a prominent family with 17th century French Huguenot and Dutch roots and his father was a notable Federalist politician who helped break the House deadlock after the Election of 1800 in favor of Thomas Jefferson. In 1855, Bayard took to the floor of the Senate to defend his father’s reputation against charges in Thomas Jefferson’s annals that Bayard Sr. made corrupt dealings with Aaron Burr to secure a position as Secretary of Navy. Bayard had turned down an appointment by Adams just as the House voted to support Jefferson for President as Minister to France. “Remarks in the Senate of the United States, January 31, 1855, Vindicating the late James A. Bayard,” (Washington D.C.: Congressional Globe, 1855).

armies with limitations on appropriations, but militias were left to state unless called into service under the exigencies specified in Article I. Two, Bayard argued Wilson's proposed bill infringed upon separation of powers by granting the president legislative power. Bayard argued Congress could properly prescribe all able-bodied male citizens eighteen to forty-five to be enrolled, but Section II erred by granting the President power to make all proper rules and regulations for enrolling and drafting the militia.²⁴⁰ The power to "raise and support armies" left it to the states to appoint officers and train soldiers, which Wilson's bill now granted to the President.

To Bayard, the bill was a troubling precedent. If Congress could delegate its power to organize and discipline the militia, then the "whole mass of your legislative functions" could be delegated including power over appropriations and articles of war, allowing the President to become the "absolute ruler of the people." The section was thus both clearly unconstitutional and "exceedingly dangerous." The Constitution delegated specific authorities to Congress and thus only Congress had to call forth militia separate from its right to raise armies. Section Four exacerbated Bayard's concerns, as he agreed with Carlile that it granted the government power to govern individual citizens before they were in service of the United States. This allowed the President to govern citizens once an order to the party to appear was given under military law. Congress could organize the militia and provide for its enrollment, but it could not *govern* the militia. Bayard cited his knowledge of the 1840 proposal by Secretary of War Joel Roberts Pointsett to create a standing army and the ensuing popular reaction in favor of protecting the "venerable militia system."²⁴¹ The people opposed past attempts to destroy the antebellum militia system and Bayard imagined they would treat Wilson's bill no different.

²⁴⁰ C.G., 37th Congress, 3rd Sess., 712.

²⁴¹ Bayard was referencing the plan of Martin Van Buren's Secretary of War Poinsett, who under his "Army Bill" aimed to create a standing army in 1840. It was referred to as a "Conscription War Bill" and was based in James Monroe's 1814 Conscription Bill. Van Buren's critics considered his support for the "nefarious" standing

Richardson, Carlile, and Bayard won a partial victory in the initial Senate debate—a minor victory in the constitutional battle over conscription. Collectively, they emphasized concerns about antebellum federalism and constitutional tradition over threats to personal liberty. Although the Senate voted along party lines as to whether to eliminate sections two and four, the military committee still agreed to subject them to alteration.²⁴² In order to push the Conscription Act through the Senate with only weeks left in the session, Wilson conceded the objections in exchange for a promise that the Democrats would not mount a filibuster or withdraw in tandem from voting. Under the revised bill, men would be conscripted for three years and would not be subject to military regulations unless they failed to report by entering the service or claiming an exemption. Wilson claimed only delinquents classified as deserters would be subject to military law, rather than all conscripts. Secondly, the bill now referred to the “enrollment and drafting of the national forces,” rather than the “militia of the United States.” The implication was that state militias would be left to the states free from Presidential control in order to maintain their independence.²⁴³ Yet, for Congressional Democrats, Wilson’s new language only convinced them further of the unconstitutionality of the act, as it bypassed the militias to directly enroll male citizens in the national forces.

Constitutional Conservative Arguments in Both Chambers

Congressional debate began in earnest on February 16th in the Senate.²⁴⁴ Debate would move from the Senate to the House on the 23rd before moving back to the Senate on the 28th. In

army, a “disgusting” and “absurd” act, over “our venerable militia system” was a reason for his electoral defeat. See William Gannaway Brownlow, *A Political Register: Setting Forth the Principles of the Whig and Locofoco Parties in the United States, With the Life and Public Services of Henry Clay* (Jonesborough: Office of the Jonesborough Whig, 1844), 195.

²⁴² James W. Geary, *We Need Men: The Union Draft in the Civil War* (DeKalb: Northern Illinois University Press, 1991), 54.

²⁴³ *Ibid.*, 54-55.

²⁴⁴ C.G., 979.

the time between the Senate and House debates, Congressmen had come under constituent pressure, with Republicans urged to pass all laws necessary to prosecute the war and Democrats pushed to show their dissatisfaction with any questionable measures including the Conscription Act.²⁴⁵ In both chambers, constitutional conservatives voiced strong constitutional objections to Wilson's bill in an effort to get their arguments on the record. Their core federalism critique was that the bill went against the volunteer tradition, ignored the textual distinction between the militia and national forces, relied on dangerous implied powers that would erode federalism and destroy state power, took away traditional state control of the militia protected by the Constitution, and placed the nation on the road to despotism as a result. The separation of powers concerns of constitutional conservatives was that the act granted the President legislative powers to decide on the timing and amount of calls for the draft, an improper delegation of authority, and that it granted provost marshals power to define crimes themselves improperly when they were not Article III officers. Thus, constitutional conservatives also voiced concerns over the act's grant of arbitrary power, a threat to both antebellum federalism and individual rights.

Core Federalism Arguments

I. The Volunteer Tradition

Constitutional conservatives saw the volunteer tradition as a significant part of Republican citizenship that separated Americans from the rest of the world. Adopting conscription removed an important constitutional tradition. Conservative Republican Senator Edgar Cowan of Pennsylvania was a moderate constitutional conservative, primarily worried

²⁴⁵ Geary, *We Need Men*, 57. For instance, New England abolitionist Orestes Browning's *Quarterly Review* produced a lengthy article in January 1863 pleading for Republicans to pass conscription, writing, "We urge conscription as the most economical, efficient, equitable, and moral method of raising and recruiting an army....it asserts the right and majesty of the state--its right and authority to command the citizen to defend it." "Art. III-Conscription and Volunteering as Methods of Recruiting National Armies," *Bronson's Quarterly Review*, Jan. 1, 1863, 68-69.

about the nationalization of the militia rather than conscription itself. If the bill was not about the militia as Senator Wilson claimed, “it is nothing” since if Congress was not providing for organizing the militia, it could not be done for the regular army.²⁴⁶ Cowan agreed with constitutional conservative arguments about constitutional tradition. The act punished those failing to report who were given notice of draft status with court martial. Considering the volunteer tradition, Cowan remarked that to his mind, “no greater anomaly could be introduced into our administration of this form of government than a proposition to compel any man under any circumstances to serve in its armies” since “our whole theory has gone upon a different hypothesis heretofore,” which relied upon the “perfect freedom of the soldier” to enter service.²⁴⁷ Cowan pleaded that those drafted who did not answer be given the chance first to pay a \$250 fine without any court-martial to avoid repressing the people. Cowan felt that republics could not be saved by men who are “utterly incapacitated” and who have been “dragged by a provost marshal into the camp” and compelled by force to do unwilling service after taking an oath with no binding validity.²⁴⁸ Republics had to be saved by loyal citizens who were willing in their hearts to serve it, the citizen soldiers of the volunteer tradition. The Union should only look to European examples if they wished by permanent law to establish a standing army, something that constitutional tradition also strongly reasoned against.²⁴⁹

Cowan also objected to the “extraordinary proceeding upon any such fiction” that men who did not respond to being drafted were to be treated as deserters. Under the law, citizens could not be deserters if they had never been in the army and not held in service. Cowan’s argument set the benchmark for many constitutional conservative arguments that would follow

²⁴⁶ Geary, *We Need Men*, 57.

²⁴⁷ *Ibid.*, 981.

²⁴⁸ *Ibid.*, 982.

²⁴⁹ *Ibid.*, 990.

with his emphasis upon the constitutional tradition of volunteerism and the clear division between the federal forces and the state militias. Rather, male citizens would be “exceeding unwilling” soldiers if they were “dragged away” from their homes to camp and compelled to enter service against their will and given no option to pay a fine, or commute his service, or furnish a substitute.”²⁵⁰ The *means* of drafting was significant. Under all preceding Militia Acts, if a man did not want to go into the service, he paid a fine and stayed home. Changing the law and ignoring this constitutional tradition made for law which was “tyrannical, harsh, arbitrary, and oppressive.”²⁵¹

Minnesota Democrat Senator Henry Mower Rice agreed with Cowan’s emphasis on constitutional tradition. He objected that the national government first refused volunteers before resorting to state drafts and then conscription, a bill “violating the constitutions of the States.”²⁵² Chilton Allen White noted that if there was any danger the founding fathers were concerned with, it was the power of a standing army. The federal government held clear power to raise and support armies, but it was to be done by voluntary enlistments and beyond that, to resort to the militia and call them into service of the United States.²⁵³ The specter of a peacetime standing army was a fear that permeated many of the constitutional conservatives’ arguments against conscription. They saw the volunteer tradition as a bulwark against despotism in the form of standing armies and omnibus federal power.

II. Separation of Powers Concerns

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*, 984.

²⁵² *Ibid.*, 998. Senator James McDougall noted that Rice was known throughout the country as a “State-rights man in the proper sense of the term” and a “strict constructionist of the Constitution.”

²⁵³ *Ibid.*, 1216.

Delaware Senator James Bayard argued that the act also ignored the Constitution's strict separation of powers by the extent to which the policy of conscription was left to the will of the President. With such prerogative power in the hands of the President, Bayard saw little check left upon the danger of centralized and arbitrary power. Bayard's concern with separation of powers led him to also object to the delegation of legislative powers to the President under the act. Only ministerial duties that were executive in their nature could be delegated. The enrollment and the draft were both ministerial but granting the President the right to conscript and to fix the number of men to be called was "simply yielding to him" the strictly legislative power to raise armies. By this power, the President could both raise soldiers to fight the Confederate forces and to "subvert the institutions of the country."²⁵⁴ Even if Bayard accepted that Congress had the power to conscript, the delegation to the President to raise armies by conscription without limitation was concerning.

III. Distinction Between the Militia and the Army

Constitutional conservatives saw the textual distinction between the militia and the army in the Constitution as evidence that national conscription was clearly unconstitutional. The power to raise a regular army may have been unlimited in number and quality, but there were qualifications to keep the army and militia separate. Charles Anderson Wickliffe, the Unionist former Governor of Kentucky, observed the Militia Acts of 1792 and 1795 proved Congress had never previously left it to the President to determine the size of the army.²⁵⁵ Wickliffe felt Congress should not delegate all such relevant power. The President was also given too much

²⁵⁴ *Ibid.*, 1365.

²⁵⁵ Wickliffe was governor from 1839-1840 as a Whig. Wickliffe was 74 at the beginning of 1863, with a political career dating back to the War of 1812, which he supported as a member of the Kentucky House. He was a member of the House from 1823-1833 and after his time as governor, he was President Tyler's Postmaster General. Lowell H. Harrison, ed., *Kentucky's Governors*, 51-53.

discretion to call on all citizens “at his will or pleasure” for two or three years or “during the war” without restriction to place citizens under military law. Like other constitutional conservatives, Wickliffe felt Congress had sacrificed state sovereignty and civil liberties to the President’s direct control.²⁵⁶ Even Illinois Republican Senator Lyman Trumbull stated state governors would have no command after the bill passed since it went “into a state and takes every man in it” and the militia systems of states would “be pretty much ended” by the bill.²⁵⁷

Indiana Democratic Senator David Turpie, a temporary appointment who served in the Senate for a mere month and a half after replacing Jesse Bright, the only Northern Senator to be expelled from the Senate for disloyalty. In the midst of the Congressional debates over conscription, Turpie was admitted to the bar of the Supreme Court with Chief Justice Taney presiding whom he saw as a worthy successor to John Marshall.²⁵⁸ During the debates, Turpie stated that the “strides towards despotism always jump the rights of the states and the people.” Armies had always been raised by requisitions of the executive upon the authorities of the states and the state militias were called into the field by that means and “no other.”²⁵⁹ He pointed to the 1787 Constitutional Convention, where the framers rejected the power to directly call forth the militia under the Article I power to enroll and organize the militia. Turpie would give no vote to support granting the President the power to violate the Constitution or take any steps not contemplated by the framers. Such enhanced power would be an unconstitutional “nullity” and a usurpation of state power.

²⁵⁶ *C.G.*, 1365.

²⁵⁷ *Ibid.*, 1000. It is worth noting that Wickliffe used the same language-abrogating, nullifying and repealing state law and constitutions and a “most extraordinary usurpation of power-to attack the Emancipation Proclamation weeks earlier in a speech reprinted in the *Globe*’s appendix. 37th Congress, 3rd. Session, *CG Appendix*, 86.

²⁵⁸ David Turpie, *Sketches of My Own Time* (Indianapolis: The Bobbs-Merrill Co., 1903), 207-208.

²⁵⁹ *Ibid.*

Ohio's Samuel Sullivan "Sunset" Cox, a key constitutional conservative in the House, was the son of a leading Ohio state senate Jacksonian Democrat, Ezekiel Cox who first made a name for himself by opposing the Lecompton Constitution alongside Stephen Douglas in 1857.²⁶⁰ He quoted Justice Story's *Commentaries* that there was a "clear distinction" between calling forth the militia and their being in actual service. The President was only Commander-in-Chief of the militia when they were in actual service and not when they were "merely ordered into service."²⁶¹ By Story's logic, if the federal government intended to take men as the militia of the country and *nothing else*, Congress could not do so *except* by the intervention of the states themselves. Unionist Lazarus Whitehead Powell, another former Kentucky governor, likewise cited Justice Story's *Commentaries* that the authority to call forth the militia and the authority to govern them were "quite distinct" and authority of Congress over the militia depended on whether the militia was deemed in the actual service of the United States.²⁶²

Powell was the sole constitutional conservative to evaluate the dual Supreme Court precedents of *Martin v. Mott* and *Houston v. Moore*. He observed that in those cases, the Supreme Court decided against the opinion of Story, who dissented to both majority opinions.²⁶³ Powell again stated that there had to be mustering into the actual service to establish federal exclusive jurisdiction and to override the local laws of states to punish individual parties. Powell

²⁶⁰ William Van Zandt Cox, *Life of Samuel Sullivan Cox, by his Nephew* (Syracuse: Milton Harlow Northrup, 1899), 81. Cox's biography cites his friend Judge Holman of Indiana as testifying that Cox in 1861 felt the Union must be maintained at "all hazards." *Ibid.*, 88. Van Zandt Cox describes the Congressman as supporting every constitutional measure to suppress the rebellion, but being "unsparing" in his criticism of claims of arbitrary power which infringed upon personal liberty. *Ibid.*, 94.

²⁶¹ *C.G.*, 1269. Cox's speech on February 26th in the House was later reprinted as a pamphlet. See "The Conscription Bill: Speech of Hon. Samuel S. Cox of Ohio," (Washington: Tower Printers, 1863).

²⁶² Powell made similar remarks during the debate over the Habeas Corpus Act of 1863. See White, *Abraham Lincoln and Treason*.

²⁶³ *C.G.*, 1383. Story went on to say in *Martin* that the "power to call the militia into actual service is certainly felt to be one of no ordinary magnitude" and it was "in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion." *Martin v. Mott*, 25 U.S., 29.

argued that because *Houston* came under a state law, even if a call had been made by the President to bring the militia into service, it was not a federal act. He interpreted *Houston* to mean the militia could only be called forth through the instrumentality of the state governments.

Constitutional conservative arguments about the distinction between the militia and army showed the commitment to strict construction of the Constitution's text. Relatedly, constitutional conservatives used the Constitution and history to observe the importance of traditional state power over the militia. Tradition and the Constitution's text like the volunteer tradition showed that federalism acted to protect the states and people against federal overreach.

IV. Removed Traditional State Power over their Militia

For constitutional conservatives, the Constitution's text not only distinguished between the militia and army, but protected state power over their militias in a variety of other ways. Further, not only did the text protect traditional state power, but constitutional history supported their interpretation of state militia power. Constitutional conservatives argued the Constitution gave the President power as the chief executive with power to call out the military resources of the Government to repel invasion and suppress insurrection, but the mode and manner was prescribed and defined by the Constitution. There was no power to force soldiers into service of the United States outside of the means established by the states over their militias. Significantly, Charles Biddle did not object to the power to compel service *per se*, but rather the source of the power, evidence that protecting antebellum federalism was emphasized over individual rights by constitutional conservatives. Biddle argued that experience proved that states and not the federal government should do the drafting. As proof, he claimed that Pennsylvania drafted with "greater

success than anywhere in the United States” under the Militia Act of 1862 by putting more men in the field than any other state.²⁶⁴

As Robert Mallory noted, the reserved rights of the states included the right to organize and officer the militia of the states when called into service of the United States under Article I.²⁶⁵ Kentucky’s Charles Wickliffe argued supporters of the act had the “strange idea” that the bill did not call the militia of the states into the service of the United States because the law encompassed every “white male inhabitant” between eighteen and forty-five as “constitutional the militia of the states.”²⁶⁶ Calling them “conscript soldiers” and taking them directly from their homes did not alter their status as militiamen. Chilton Allen White maintained that the militia was meant to be a bulwark against the encroachment of military authority upon the rights and liberty of the people by the federal government. The founding fathers felt they were “sufficient guarantees against any dangers” from a standing army.²⁶⁷ Charles Wickliffe agreed the distinction between the militia and army mattered precisely because volunteer soldiers were militia and the *volunteer* army was made up of militia, as opposed to the regular army.²⁶⁸ He argued that the question of Congressional power over the militia was a “subject of violent denunciation” during the Constitutional Convention and ratification debates. Anti-Federalists urged that it was dangerous to give the national government the “slightest control over the militia” because it might led to the destruction of state governments.²⁶⁹ Wickliffe pointed to Alexander Hamilton’s warning in *Federalist* 23 that no danger of a standing army could be

²⁶⁴ *Ibid.*, 1216.

²⁶⁵ *Ibid.*, 1250.

²⁶⁶ *Ibid.*, 1258.

²⁶⁷ *Ibid.*, 1225.

²⁶⁸ *Ibid.*, 1258-59.

²⁶⁹ *Ibid.*, 1259.

realized since “no ambitious leader could wield it to the prejudice and destruction of popular rights” when the force was raised from the body of the people and officered by the states.²⁷⁰

New York Representative John Benedict Steele noted the language of Washington’s Farewell Address and imaging the “horde of Federal officers” that would take citizens and march them out of the state for three years or the end of the war and then march others “off to the government prisons” because “some people fellow has been taken whom we thought ought not to go.”²⁷¹ The Constitution and its framers had clearly contemplated that when the army was drawn from the states for temporary service, it should be raised, officered, and drilled by state officers and governments. The federal government was one of delegated and restricted powers and constitutional conservatives like Steele were opposed to the doctrine of a “latitudinarian construction of the Constitution.”²⁷² The “immense scheme of unlimited conscription” begged the question of whether a “shadow” of state rights would remain. Samuel Cox agreed, arguing that if constitutional nationalist arguments were right, the Constitution would grant unlimited power over the power to create or increase the regular army, eliminating the militia. The act was against the “letter and spirit” of the Constitution by taking from states’ rights over their militias, a right “never to be yielded by a free people without dishonor and danger.” Unless called into the service of the United States, the militia was under command of the state executive and state laws *fully* controlled.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*, 1264. In the 1840s, Steele was Otsego County District Attorney from 1841 to 1847 and served as a special judge of Ulster County from 1850-1860. *A Biographical Record of the Kappa Alpha Society in Williams College From Its Foundation to Present Time, 1833-1881*(New York: S.W. Greene’s Son, 1881), 58.

²⁷² *C.G.*, 1264. Steele saw the income tax and conscription as collectively the biggest threats to federalism. Taxes should be collected and raised under state law and by state government agencies, the law had federal officers appointed by the President “scattered all over the state” and other states. It placed the entire financial system under the control of the executive while pushing local banks out of existence. The Conscription Act did much the same and these acts collectively pointed to the arrival of federal supremacy.

Cox saw the Second Amendment as an additional bulwark against federal usurpation of the states' right to control of their own militia. No emergency could alter this constitutional structural protection unless the militia was called into federal service. He looked to James Madison and Alexander Hamilton. While both supported strong national government at the Constitutional Convention, Cox understood them to support his understanding of federalism. Madison foresaw and feared the "awful consequences" of disputes between the state and federal powers, including insurrection. By passing the Conscription Act, Congress would "hazard the fearful consequences of a further disruption of the federal ties, by entrenching upon" state rights before embarking "this troubled people upon new seas of blood, amidst other and worse storms of conflicting power."²⁷³ To Cox, the fact that the "great apostle of consolidation," Alexander Hamilton agreed with Jefferson and Madison showed the strength of the constitutional tradition regarding state militia power.²⁷⁴

When debate returned to the Senate a second time on February 28, James Bayard reiterated concerns over the erosion of traditional state militia power. Bayard saw the act as dangerous to the security of the states and civil liberties. He agreed with Cox that the bill did not comport with the demands of the Second Amendment, which was meant to restrict federal power. Instead, he felt it was rendered "nugatory" by the Conscription Act. Bayard felt that without the Second Amendment's restrictions on federal power, the Constitution would not have been ratified. Further, neither Congress' Article I power nor the President's power as Commander-in-Chief allowed for the federal government to conscript the entire male able-

²⁷³ *Ibid.*

²⁷⁴ *Ibid.* Cox also cited Hamilton's speech at the New York Ratifying Convention as arguing that state governments were "absolutely necessary to the system" and that the Union was "dependent on the will of the State governments" such that it would be "utterly repugnant to this Constitution to subvert the state governments or oppress the people."

bodied population. Wilson's altered language did not alleviate Bayard's concerns. The proposed bill was not under the constitutional power to organize, arm, and discipline the militia or for "calling forth" the militia, but for the first time, placed all able-bodied citizens in a standing army at the "will and discretion of the President" under the power to "raise and support" armies.²⁷⁵ Bayard did not believe there was any limiting principle to stop Congress from expanding the age range further and encompassing the whole male population. Thus, the militia system was obliterated, and the states left powerful to "resist any aggression" of the national government, an argument echoed in both chambers by constitutional conservatives.²⁷⁶

For constitutional conservatives, the Conscription Act threatened the entire, careful structure of federalism in the Constitution. It ignored both the Constitution's text and tradition which protected the power of states over their militias unless called into the service of the United States under the proscribed constitutional modes. This interpretation once again reflected the commitment to strict construction of the text that did not allow for other modes, like conscription, to be used by the federal government or President to command and call out the militia. Constitutional conservatives, as strict constructionists and historic originalists, argued that implied powers were dangerous and particularly the power to conscript could destroy both antebellum federalism and the constitutional republic generally.

V. Danger of Implied Powers and Reliance on Strict Construction

Constitutional conservatives like Ohio Democrat Chilton Allen White argued that as a rule of construction, every other power and mode not defined by the Constitution was

²⁷⁵ *Ibid.*, 1363.

²⁷⁶ David Turpie agreed, saying that while he did not deny the power of Congress to raise and support armies, the bill furnished to the President "merely a direction." The power of states and state executives was "destroyed" and "wiped out," with the President empowered to both enroll and organize the militia and to officer the militia. This put all significant matters of militia action and organization under the President, interfering with the careful structure of federalism." *Ibid.*, 1368.

excluded.²⁷⁷ The Constitution's text made clear what powers the respective governments in a federalist system held over the militia. For White, the Constitution clearly outlined the limited and defined powers of Congress over the militia, limited to "calling forth the militia to execute the laws of the Union, to suppress insurrection, and to repel invasions." *No other conceivable purpose* could be used other than what was enumerated. Congress' power to organize, arm, and discipline the militia for "plain" and "practical" purposes to establish uniformity over the state militias when brought together in service of the United States.²⁷⁸ The Constitution gave no additional power to enact national conscription, as every other mode and power was excluded from Congress given the well-understood dangers of a standing army.

Robert Mallory agreed that the act granted "absolute and unlimited power" and harmed the liberty of the people by conferring on the President the power over the entire militia force of the United States.²⁷⁹ Bayard, following strict construction principles, only read the words of the Constitution according to a "rational construction." He thus believed the text "must be understood, having relation to the form of Government and the other provisions of the Constitution" and only the powers *intended* were conveyed. He believed the only way to correctly interpret the general language of the Constitution was to look to the country's history. Constitutional tradition was the guiding principle and the only fair construction of the power to "raise and support armies" was by previous, known modes.²⁸⁰ Bayard listed the appropriate methods as voluntary enlistment, recruiting, or volunteering, but not conscription, as even during the War of 1812, conscription was avoided despite the armed forces being "miserably deficient in soldiers." Because the government was one of "specially delegated powers," the power to

²⁷⁷ *Ibid.*, 1225.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*, 1249.

²⁸⁰ *Ibid.*, 1363.

raise and support armies could not be used to “obliterate” the state militias and to centralize power in the presidency. Bayard asserted that there were “necessary powers needful to carry into effect granted powers,” but the issue was whether “new and extraordinary powers” could be implied. He felt that if the broad implied claimed by Congress under the Conscription Act were accepted, then there should be similar implied *limitations* on the general worlds of power granted to Congress and the President.²⁸¹ The power to conscript had never been attempted by any Congress. It had *always* been previously understood that the reserved force of the nation was the state militia called into service by the President not as individual citizens, but as an organized body commanded by state appointed officers. Otherwise, the other constitutional provisions referring to the organization of the militia would be unnecessary. The difference was “very wide” between the original understanding of federalism and the proclaimed power over all eligible male citizens to be placed in a regular standing army.²⁸²

The cantankerous Willard Saulsbury Sr. agreed that the framing generation understood that large standing armies were dangerous to liberty. Thus, the proposed power to “call out the militia” was contested with the “most serious objection” in many state ratifying conventions as depriving the states of the power of protection by their own militia. Even Federalists claimed that Congress would never presume to call out the whole militia of the states and no delegates in the conventions proposed to grant under the power to raise armies such an “unlimited, absolute, and despotic power” over the whole people precisely because the mode of raising armies compatible with republican liberty was only voluntary enlistment.²⁸³ If the “necessary and proper” clause gave Congress *any* means to employ to carry out the power to raise armies the Constitution

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*, 1388.

would be a “self-destroying instrument” because it would work to erase states’ rights. Under strict constructionism, conferred powers must be “reasonably interpreted” and without express limitation was still limited by other co-delegated powers or rights inconsistent with such unlimited power.

Thus, constitutional conservatives saw a clear nexus between implied powers and the potential to destroy the Constitution’s federalist structure in favor of despotism. To bend the Constitution to support national conscription in their eyes necessarily meant the creation of an omnibus, unlimited federal government. As constitutional conservatives argued, such arguments essentially supported dictatorship, not democracy.

VI. Conscription as Despotism

Constitutional conservative arguments against conscription were broadly part of an effort to resist the expansion of federal power and the creation in their eyes of a centralized despotism. Charles Biddle argued the Conscription Act, along with the other March war measures, changed the whole framework of government and replaced the “constitutional government which was originally so carefully devised” with European despotism.²⁸⁴ David Turpie agreed that conscription harkened back to the days of “Danton and Robespierre” and the “rights and privileges of royalty which disgraced England in an age prior to Runnymede.”²⁸⁵ The bill not only was an affront to American constitutional tradition, but to Anglo-Saxon liberty and the “liberty in all ages of the world.” Lazarus Powell similarly complained the bill was dangerous to the people’s liberties and was created to strike down states’ rights by making the Union of independent states a “grand, consolidated despotism.”²⁸⁶ America should look to British

²⁸⁴ *Ibid.*, 1214, 1225.

²⁸⁵ *Ibid.*, 1368.

²⁸⁶ *Ibid.*, 1382.

precedent, where since “throwing off the bounds of the feudal system,” they had avoided conscription.²⁸⁷ Further, the risk was not just destroying the rights of states, but destroying private enterprise and interrupting families, merchants, and impeding upon free people in all capacities. The irascible William Saulsbury Sr. forbiddingly warned the chamber that they were following the example of Augustus, establishing despotism over the ruins of a great republic through a standing army. As he foretold, “you are but repeating history and as the history of Rome told the fearful, dreadful tale of ruin and destruction.”²⁸⁸

Chilton Allen White thought that among the many threats to the Constitution and civil liberties, there was “no more dangerous and fatal blow” than the Conscription Act. The President would now have one of the largest standing armies in history at his power to accomplish any purpose. White condemned the “whole scope, spirit, and intent” of the bill as one that invested the President with “military power over every citizen” from twenty to forty-five and converted the whole country into “one vast military camp” by converting citizens to soldiers and the President to “supreme arbiter of power.”²⁸⁹ Leaning on hyperbole, White stated the bill might as well have been entitled “a bill to declare and establish a dictator” since it absorbed the “whole of the militia of every state” by putting all its citizens “at the will of one man.”²⁹⁰ Again, concerns with arbitrary power and threats to individual liberties were connected to the greater assault upon antebellum federalism. As White stated, conscription “unmistakably” represented the grander scheme for the “overthrow of the Union” in order to build a new government on the idea of territorial unity and consolidated power.²⁹¹ It was, he thought, an “incongruity” with the idea of

²⁸⁷ *Ibid.*, 1384.

²⁸⁸ *Ibid.*, 1389.

²⁸⁹ *Ibid.*, 1225. Like Charles Anderson Wickliffe, weeks before, White had used similar language to attack the Emancipation Proclamation as unconstitutional. *Ibid.*, 90.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

free government that the federal government could enforce its laws and authority over a large portion of its people by an “army compelled by force, by conscription, to undertake the duty.”²⁹² Representatives like White saw the Republican act an assault on the whole Constitution because it granted arbitrary power to an expanded federal government at the expense of the states.

As a constitutional conservative, James Bayard linked the latitudinarian construction of the Constitution behind conscription to the encouragement of despotism. The Constitution was built on the theory of limited power and checks and balance.²⁹³ The precedent of national conscription allowed for a future “ambitious man” to “override the liberties of his country by means of the entire military force” under his control. Only through a “stern and rigid adherence” to the Constitution’s textual limitations could free government be maintained and “centralized despotism averted.”²⁹⁴ Bayard relied on a battlefield metaphor, warning that the Conscription Act was at “war with the very existence of a republican government” based on world history in which republics were always destroyed by arbitrary, military power.²⁹⁵

Constitutional conservatives did not merely believe the Conscription Act was unconstitutional because it went beyond the federal government’s explicit powers. It was such an egregious enlargement of power that it raised the possibility of destroying the constitutional republic itself. It was a hyperbolic and apocalyptic image that reflected the genuine, emotional attachment of constitutional conservatives to the Constitution’s text and tradition.

VII. Arbitrary Power and Individual Rights

²⁹² *Ibid.*

²⁹³ *Ibid.*, 1365.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.* Bayard would later use such language about despotism and the threat to the republic of expanding federal power to oppose Reconstruction. For instance, in 1869, he opposed the 15th amendment, noting that despotism could only be avoided by adhering to the limitations on federal powers in the Constitution and universal or uniformity of suffrage was not among the delegated powers. “Speech of the Hon. James A. Bayard of Delaware, in the United States Senate, February 6, 1869” (Philadelphia: Sherman & Co. Printers, 1869), 7.

Outside of the core federalism arguments made by constitutional conservatives, they also criticized the Conscription Act for its grants of arbitrary power to federal officials which would harm civil liberties. Such arbitrary power was linked to federalism, as constitutional conservatives believed that grants of arbitrary power to federal officials would necessarily further erode state power, especially from local officials and courts. Charles Biddle found it troubling that the bill transferred to the President “without limitation of time or place” and the protection of the state courts the power over the writ of *habeas* while Congress also granted federal officers’ full immunity if under Presidential orders. The provost marshal’s power threatened not just individual rights, but antebellum federalism by its grant of arbitrary power. Biddle noted that the act placed a provost marshal in *every* congressional district to investigate and report treasonable practices, which Biddle read as granting federal officers summary power to arrest anyone who “may be obnoxious to him or his superiors.”²⁹⁶ Biddle was equally concerned with the new, extensive federal bureaucracy created by the Conscription Act. The country would be under a “network of military authority” and for the first time, this “new character in civil society” would be recognized by law without limitations on the authority of provost marshals necessary to protect citizens from extraordinary abuses of power.²⁹⁷

Biddle looked to not only the Constitution, but ancient English common law, referencing both Blackstone and Sir Matthew Hale to argue that the provost marshal, “this little military despot,” could exercise no power over free-born citizens. Hale and Blackstone showed when civil courts remained open, military courts or martial law should be rejected.²⁹⁸ Biddle looked to the decision of Pennsylvania Chief Justice Lowrie in *Hodgson v. Millward* for support. In a jury

²⁹⁶ *Ibid.*, 1215.

²⁹⁷ *Ibid.* Lincoln’s September 24, 1862 order suspending *habeas corpus* show how already the civil law had been “swept away by the fiat of executive power” and replaced the Constitution as supreme law.

²⁹⁸ *Ibid.*

charge, Lowrie argued the acts of the President and his administration were “without right, unless they are authorized by some article of the Constitution, or of the laws made under it and consistent with it.” Biddle called the truths of Lowrie’s charge self-evident and ones reasserted “with firmness and precision” by Judge Ludlow in the highest criminal court of Philadelphia.²⁹⁹ Biddle wished to amend the act to never authorize the arrest or trial by military authority any person not in the military service of the United States or drafted into the service under the provisions of the Conscription Act.

Armed with the protection of the Indemnity Act, the Conscription Act ensured political violence against Democrats by individual provost marshals. Pendleton agreed that the bill gave the “whole power of the government” to the executive through the creation of the provost marshal touching every congressional district in the country.³⁰⁰ He too feared it would be a political tool for oppressing Democrats and their supporters. Chilton Allen White expected these officers would be “violent political partisans” who held the “personal liberty and the personal security” of every citizen in their hands armed with the power to arrest for “treasonable practices.”³⁰¹ He wondered why provost marshals, often untrained in the law, should be trusted to construe the statute and judge the loyalty of every citizen. Worse, not only did the bill impair the right to a speedy and public trial by an impartial jury, but injured citizens could no longer appeal to the local state judicial tribunals for redress of injuries.³⁰² White was clear about the

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*, 1255-56. It was language Pendleton would later repeat in a March 30 speech in Hamilton County, Indiana when he called the Conscription Act an act that overrode state constitutions, rights and laws to make Lincoln a dictator. “The Main Meeting of the Democracy of Hamilton County-Speeches of Vallandigham, Pendleton and Voorhees-Proposing a National Democratic Convention in Indianapolis,” *Indianapolis State Sentinel*, March 30, 1863, 2.

³⁰¹ *C.G.*, 1225.

³⁰² A significant and related bill, the Indemnity Act, like the *Habeas Corpus* Act of 1863, was passed on March 3 as well. Constitutional conservatives were concerned with its constitutional threat, but it did not engender nearly the same degree of discussion. White spent more time than any other constitutional conservative on the Indemnity Act. He argued the Indemnity Bill added to the injustice of the Conscription Act by expanding federal

connection between arbitrary power and the threat to antebellum federalism. The bill was a “monstrous” provision which was an “open and flagrant violation of the Constitution” and “in derogation of the rights and established institutions of the states.”³⁰³

Robert Mallory agreed that the provost marshal was the “most odious and oppressive” part of the act. The Provost Marshal were regarded throughout the country as “infamous....tyrants” who were “enemies of free government” and endemic to national corruption.³⁰⁴ Mallory was concerned that the provost marshal violated separation of powers, as provost marshals were well-known and recognized by martial law but only under the laws of war. They belonged to the Army, not under the powers of Congress. Mallory feared that as a result, the “odious” doctrine of constructive treason would be resurrected.³⁰⁵ Like Mallory, Pendleton agreed that these powers were crafted to be political weapons “hidden in the breasts of these” provost marshals until “partisan malice or personal hatred” caused them to procure arrests. This was the “very essence of tyranny.”³⁰⁶

Ohio’s Samuel Cox likewise suspected that these federal officers would act as spies and partisan denizens acting against Democrats while eroding state power.³⁰⁷ Democrats and

judicial power while diminishing state judicial power and threatening the tradition structure of federalism. The Indemnity Bill set up a “novel and unusual mode of appeal” to the federal courts. Now operating under color of authority from federal law or the executive with proof would “constitute a good and valid defense to the action.” *Ibid* at 1225-26. The Indemnity Bill of the Conscription Act overthrew both state constitutions and courts and removed “every possible” means of citizens protecting their personal liberty. *Ibid.*, 1226.

³⁰³ *Ibid.*, 1225-26.

³⁰⁴ *Ibid.*, 1250.

³⁰⁵ *Ibid.* (Referring to the policy of King Edward III under the Treason Act of 1351, meaning “imprisoning the King” or usurpation-creating new crimes of treason)

³⁰⁶ *Ibid.* David Turpie added that the President himself could use the system as a means of political favoritism. Because the act gave no qualification in granting the President absolute power to require of any district any number of men he pleased with no limit, Turpie imagined that the President could see fit to favor districts politically friendly to him with exemptions while imposing heavier quotas on disfavored districts. *Ibid* at 1368.

³⁰⁷ Cox would repeat such criticisms in a late September speech, arguing that the various constitutional violations, from legal tender, to the suspension of *habeas*, to the conscription law and “practically breaking down the militia laws” for the abolition war. “Democratic Meeting at the City Hall: Speech by Hon. S.S. Cox, of Ohio,” *Detroit Free Press*, September 28, 1863, 1.

constitutional conservatives would be singled out not for disloyalty, but for differing in opinion over the Republican war policies.³⁰⁸ Cox noted the now familiar separation of powers concerns that Congress could provide for the organization of the militia or their enrollment, but that could not be done by the President. He also argued the Conscription Act violated the Seventh Amendment's guarantee of a right to jury trial by subjecting drafted men to martial law.³⁰⁹ Cox suggested that it not only subverted state government but was oppressive to the people and broke down the "barrier which the people erected against consolidated power."³¹⁰

Indiana's David Turpie agreed with Cox that the arbitrary power granted under the Conscription Act both subverted federalism and clashed with the Seventh Amendment. The section which allowed punishment by military commission subject to the articles of war had to be regarded as a "broadside to obliterating the great fact of state jurisdiction and state authority."³¹¹ This was a clear violation of the Seventh Amendment which proposed to unconstitutionally "revolutionize the whole system" of criminal procedure by placing any soldier liable to the civil authority under military authority. This was a "radical" and "extreme" departure from the principles of civil liberty which would remove the jurisdiction for criminal offenses from state authorities entirely into the hands of the military authority.³¹²

Constitutional conservatives who interpreted the Conscription Act to grant arbitrary power to federal officials and erode civil liberties linked those concerns to the larger federalism-based arguments. This included violating the Seventh Amendment by taking cases from civil

³⁰⁸ *C.G.*, 1269.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*, 1269.

³¹¹ *Ibid.*

³¹² *Ibid.* William Saulsbury agreed that the bill violated the Seventh Amendment by referring to the "land forces" of all able-bodied men twenty to forty-five. Citizens were deprived of their rights by being made subjects to the articles of war and to answer for non-capital or "otherwise infamous crimes" without the presentment or indictment of a grand jury. Further, because the Seventh Amendment was constructed with the volunteer tradition in mind, citizens could only freely choose to place themselves under military law and the articles of war. *Ibid.*, 1389.

tribunals—particularly state courts—and placing civilians under military justice. This threat only exacerbated the threat of despotism brought upon by conscription in the eyes of constitutional conservatives.

Constitutional Conservatives’ Victories and Failures

Democrats had made effective use of their opposition, forcing New York’s Abram Olin, the chairman of the House Committee on Military Affairs, to recommend modifications to the bill to eliminate the “treasonable practices” clause and to change Section XXV to require provost marshals to deliver any nonmilitary prisoners to civil courts and limit commissions to trying spies only.³¹³ Beyond changes to the language, constitutional conservatives also got their constitutional objections to the general bill on the record for their constituents to see. Still, most Democratic amendments attempting to limit the power of the Provost Marshal or to reserve state powers were broadly rejected.³¹⁴ The only amendment of any consolation to the Democrats that was agreed to was that of Indiana Republican Schuyler Colfax, who amended the act to limit terms of enlistment to two years instead of three or the duration of the war. Ultimately, the vote in the House on the Conscription Act was 115 to 49, with the vote almost entirely along party lines with 36 of 40 Democrats opposed, 13 of 24 Unionists opposed, and 98 of 100 Republicans in favor. Only a single Republican, Martin Conway of Kansas, voted against the Conscription Act. Notably, Hendrick Wright, who could not fully support the act nor the rhetoric of fellow Democrats, abstained from the vote. But for a single vote, all border state representatives voted

³¹³ Geary, *We Need Men*, 61. Olin was a trained attorney who was nominated a mere week after the Conscription Act was passed to the Supreme Court of the District of Columbia.

³¹⁴ *C.G.*, 1292. Ohio’s Clement Vallandigham move to amend Section XXV to force any citizens’ arrest by the provost marshal to be delivered to the civil authorities and to limit the punishment to a fine of \$500 or up to two years of imprisonment or both. The amendment was struck down 101 to 57. Wickliffe introduced a proviso that the men call into service “shall be by the Governor of the State organized into companies and regiments and officers to command them shall be appointed and commissioned by authority of the State” in obedience to the laws of the state and the Constitution of the United States. The proviso was voted down 104 to 55, with support coming only from Democrats.

against the law or abstained. Constitutional conservatives were mostly united in both the debate and their votes, but were unable to stop the bill from getting through the House. However, this was never their goal because it was clear from the beginning that Republicans would prevail in passing the act. Instead, the constitutional battles over conscription started in Congress in February centered around the effort to get constitutional conservative arguments on the record to be shared with their constituents. As historian James Geary rightly states, Democrats had effectively wielded minority power by eliminating the “treasonable practices” clause and altering section twenty-five while preventing the Republican leadership from rushing through a conscription law.³¹⁵

Constitutional Nationalist Responses

Crafting constitutional rhetoric by legislative debate to be shared with the public was not limited to constitutional conservatives. Both War Democrats and Republicans voiced their support for the Conscription Act as constitutional nationalists, responding to constitutional conservatives with their own constitutional arguments. Broadly, they were certain that Article I combined with constitutional tradition and history gave Congress the means to pass the Conscription. Further, the necessity of the act to protect the nation and the Constitution itself were clear.

Not all constitutional nationalists believed the national government assumed plenary powers under the necessities of war. Some supporters of the Conscription Act were moderate constitutional conservatives who thought it was right to criticize particular sections of the act but were not opposed to the principle of national conscription. More moderate voices like Michigan Senator Jacob Howard and Wisconsin Senator James Doolittle split with most Republicans and

³¹⁵ James Geary, *We Need Men*, 52, 60-61

War Democrats on the question of including persons of foreign birth under “all abled bodied males,” while constitutional conservative moderates like Hendrick Wright were more concerned with limiting the powers of the Provost Marshal. Howard and Doolittle felt that it would be unconstitutional to allow the President to unilaterally decide who would be subject to the draft including aliens. Congress held constitutional power to establish uniform rules of naturalization. For Howard, conscription was a limited power only applicable to citizens and Congress could not compel foreigners to enter military service because only citizenship itself gave rise to the obligations of coerced military service. Some War Democrats went beyond the narrow complaints of moderates and were willing to embrace some constitutional conservative criticisms.

Hendrick B. Wright of Pennsylvania joined fellow Pennsylvanian Charles Biddle’s objection to the proposed powers of the provost marshal. Wright considered himself a constitutional conservative, spending a debate recess “indulging in a train of marks as to a strict observance of constitutional construction in the enforcement of the laws.”³¹⁶ Wright argued that the Provost Marshal was given power to dispose of cases without trial by jury, violating the Seventh Amendment, along with power to decide what constitutes “treasonable practices” when the Constitution explicitly defined treason.³¹⁷ Wright agreed with constitutional conservatives like Robert Mallory and Chilton Allen White that the Provost Marshal held both the power to arrest and to imprison, depriving the citizen of his “personal liberty without a trial by jury” or “ordinary forms of law.”³¹⁸ Rhode Island Republican William Sheffield was similarly concerned

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, 1219. Wright complained about Section 25, which gave the Provost Marshal summary power to arrest and imprison any for up to a year.

³¹⁸ *Ibid.* Wright was unwilling to put “the life and liberty of the citizen under whim and caprice of every upstart officer.”

with arbitrary power and the power of Provost Marshal officers to define “treasonable practices.”³¹⁹ Congress could not have intended to give individual provost marshals the power to create or define such offenses defined by the Constitution’s text. Wright was also unimpressed by the Republican defense that local officers could normally make arrests without warrants. Wright understood that such local officers were peace officers under civil regulations of state governments. Thus, Wright again found common ground with other constitutional conservatives linking concerns about arbitrary power with interference with traditional state power. This common cause proved to be a small victory for constitutional conservatives. The support of Sheffield and Wright to helped push Abram Olin to recommended modifying the bill to remove the “treasonable practices” clause.

However, Wright and Sheffield did not agree with Democratic constitutional conservatives about the power to conscript. Wright otherwise supported the bill, as he would send “every man in the loyal states into the field if necessary” and “every drop of blood to put down the rebellion.” For War Democrats like Wright and Sheffield, threats to civil liberties were their only constitutional quibble with the bill. As Wright put it, he wanted to support anything and everything that could be done to crush the rebellion within the bounds of the Constitution. Rebellion could only be put down under “strict adherence” to the laws-otherwise, anarchy and “irretrievable ruin” would fall the republic.³²⁰ For Wright, constitutional conservatism meant adherence to the rule of law and strict constructionism but did not inevitably lead to opposition to robust war policies like conscription seen as necessary to saving the constitutional republic. Not all constitutional conservatives opposed to conscription found it unconstitutional.

³¹⁹ *Ibid.*, 1223.

³²⁰ *Ibid.*, 1219; *Ibid.*, 1224 Sheffield only wished to make the bill “as acceptable as possible.”

Unionist Benjamin Franklin Thomas was even blunter in his mixed support for the act, calling the bill constitutional and necessary, but also “terrible” both in its powers conferred on the executive and in the duty and burdens placed upon citizens.³²¹ He referred to the “simple and clear provision” which granted the power to “raise and support armies” without limits or restrictions. In this area, Congress’s power was supreme and independent. Thomas thought there was not a human being “within the United States “whom this government is not capable of taking for military service. Yet, he did understand the clause to not be designed for permanent service, but only to meet “special exigencies” for brief periods of time.³²² The United States faced a question of “life or death” and Congress had no choice but to employ conscription.

Outside of concerns over the extent of the provost marshal’s powers and meaning of “all able-bodied males,” constitutional nationalists were certain about the constitutionality of the power to conscript. Senator Henry Wilson, as the author of the bill, constructed many of the core Republican responses to constitutional conservative criticism. Wilson emphasized the broad powers of Congress under Article I and the support of constitutional history and tradition for national conscription. When introducing the debate on the 16th, Wilson looked to sweep aside the federalism-based concerns of constitutional conservatives. Wilson argued that the conscription was an enrollment of the population of the country, not the militia, and that it had “nothing to do with the militia laws” and only enrolled “the people fit to do duty.”³²³ The purpose of the act was to make male citizens not currently enrolled available to the national

³²¹ *Ibid.*, 1288.

³²² *Ibid.*, 1289.

³²³ *C.G.*, 978; “Senator Wilson, the Author of the Conscription Act,” *Harrisburg Daily Patriot and Union*, Oct. 29, 1863, 2.

forces of the United States—that they *may* be called into service.³²⁴ Wilson further contended his bill only allowed the President the power to make the necessary rules and regulations for enrollment and drafting of the militia and did not take away the reserved powers of the states to appoint officers and train their militias. The change was necessary precisely because of experience of militia drafts, in which “not one fifth of those men were ever mustered into the service of the United States.”³²⁵ Persons drafted into the service of the United States needed to be under the rules and articles of war as if they were mustered into the service. Republican Senator Jacob Howard of Michigan agreed and added that the act did not actually call any one person into service, but “simply provides for the enrollment of a certain portion of the people of the United States for military service.”³²⁶ Constitutional nationalists felt there was a meaningful distinction between the enrollment and the calling of enrolled men into service when the President makes the call.

Constitutional nationalist arguments generally followed from Wilson’s arguments. Abram Olin admitted the Conscription Act exercised the power to “raise and support armies” for the first time under the “true and proper sense of the grant.” He understood the “plain” language of the Constitution granted the power to conscript and that Madison and Monroe sanctioned this power during the War of 1812, along with “every commentator upon the Constitution.”³²⁷ Olin was forthright that constitutional conservatives were right that the country previously relied upon volunteers and had been constrained by state law, but observed that this system failed the

³²⁴ Maine’s Samuel Fessenden agreed. The Conscription Act’s title gave its unobjectionable purpose—to enroll and call out the national forces. The bill enrolled the national forces and granted the President the means to prosecute the war “vigorously.” *C.G.*, 1265-66.

³²⁵ *Ibid.*, 711.

³²⁶ *Ibid.*, 989.

³²⁷ *Ibid.*, 1214. (The Conscription Act was the first attempt to use that “great power, more than all others the index of our nationality, to compel all our citizens to devote their lives to sustain, defend, and perpetuate the life of the Republic.”)

pressures of civil war.³²⁸ Further, the power to “raise and support armies” was expressly given to Congress and only the “accursed doctrine of state rights” and state sovereignty supported the idea of calling upon state governors to furnish troops.³²⁹ William Sheffield argued that both the Constitution and the law of war supported conscription. The constitutionality of conscription, like other war measures, would be settled by the war itself.³³⁰ He noted that the bill was a “strong measure” which took “able-bodied men from their homes by force, and put them into the service of the country” to defend the country against its enemies.³³¹ Conscription was necessary to conduct war “according to the rules of civilized warfare.” Sheffield cited the same “ample” powers under Article I as Wilson and Olin, but also argued the Constitution provided several means of seizing property for the public good. Sheffield pointed to the powers to levy and collect taxes, to take every dollar of treasure for the support of government, and the right of eminent domain. These all showed that the government, when necessary, was entitled to press property into service of the government.³³²

California Republican Aaron Augustus Sargent also felt that constitutional tradition clearly supported the bill. To him, the experience of the Civil War exposed the “inherent weakness” of the volunteer system. Volunteer troops were efficient but only for short terms of services and eventually requires relying on new, undisciplined troops. Sargent tersely reminded his colleagues that the United States was the only “power on earth that depends upon volunteer forces to conduct a protracted war” and that the Confederacy had already resorted to conscription

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ See Cynthia Nicoletti, *Secession on Trial: The Treason Prosecution of Jefferson Davis* (New York: Cambridge University Press, 2017, 85-87 (Noting that Americans used the medieval concept of “trial by battle,” as war could act as a method of lawmaking used to determine the legitimacy of the ultimate expression of state sovereignty-the right of secession-over the legal process)

³³¹ *C.G.*, 1214.

³³² Another War Democrat, Judge Smith in New York, would employ a similar argument in April. See Chapter 4.

the previously April.³³³ He also sardonically addressed the federalism-based arguments of constitutional conservatives, arguing that they acted as “if the founders” had “erected this beautiful fabric of liberty and national glory, and provided no means to secure its safety.”³³⁴ Sargent had no qualms in stating that the Constitution gave the right to summon *every* man in order to crush the rebellion.³³⁵ Certainly, the Constitution meant to reserve certain powers to the state and local governments, but also gave the federal government the power to maintain the nation.³³⁶

For former Jacksonian Democrat and Judge William Darrah Kelley of Pennsylvania, the majority of the debate had been granted to opponents of the bill to “engender discontent” and not to enlighten the people.³³⁷ He felt the lack of precedent for the federal power to conscript was due only to the sheer lack of necessity in earlier wars.³³⁸ Like Sargent, Kelley utilized constitutional tradition to rebut constitutional conservative arguments. Kelley stated that during the Revolutionary War in Pennsylvania, the Executive Council sent men into Virginia who “talked as gentlemen have talked on this floor” where they were seized and denied the right to *habeas corpus*.³³⁹ He noted the transaction was approved by Washington himself and the

³³³ *Ibid.*

³³⁴ *Ibid.*, 1222.

³³⁵ *Ibid.*

³³⁶ *Ibid.*, 1367. Looking to the *Federalist Papers*, Sargent suggested power to maintain the nation included command of “all the forces that are necessary for its own maintenance.”

³³⁷ *C.G.*, 1270. Kelley’s speech would be frequently reprinted in the Republican press and in pamphlet form. Kelley was another former lawyer in Congress. He was one of the founding members of the Republican Party, a staunch Unionist and abolitionist referred to as “Judge” by colleagues, as he once had been on the Court of Common Pleas in Philadelphia County. Mark A. Weitz, *The Confederacy on Trial: The Piracy and Sequestration Cases of 1861* (Lawrence: University of Kansas Press, 2005), 88-89; *Daily National Intelligencer*, February 25, 1863, 2. Kelley was considered the most able Republican speaker and drew loud applause from the galleries during his speech. Geary, *We Need Men*, 60.

³³⁸ *Ibid.*, 1271. As discussed in Chapter One, Kelley’s claim was not wrong, but went to the central difficulty of the Civil War conscription question—for Americans who venerated the founders’ Constitution through a vibrant constitutional culture, there existed no tradition of national conscription because the circumstances of the Civil War and the manpower needs in 1863 had not previously existed.

³³⁹ Kelley was clearly thinking about constitutional conservatives as disloyal. Kelley blithely argued that if the examples of the Revolutionary War and Andrew Jackson had been followed and “some of the men who now

Continental Congress passed a bill of indemnity to cover all concerned parties.³⁴⁰ For Kelley, the deaths of two hundred thousand men and the stakes of the war itself had changed the circumstances significantly. He uniquely believed conscription made America a stronger nation in the eyes of European powers, acting like the Monroe Doctrine by announcing to European governments not to meddle in American affairs.³⁴¹ If the Constitution was to have global influence, a strong national government was required. Under the residual powers of nation-states, the federal government could call every able-bodied man forth to do strengthen the nation.

While Wilson, Kelley, and others focused on constitutional responses to constitutional conservatives, some Republican focused their attacks on loyalty and partisanship. California Senator James McDougall agreed that Henry Rice's were comparable to those of South Carolina during the Nullification Crisis in arguing against federal supremacy.³⁴² Republicans often treated the constitutional rhetoric of the opposition as a sign of disloyalty. California Representative Sargent called all those opposing the Conscription Act were "demagogues" who sought to "ruin" the Republic by preventing enlistments and did not acquiesce in measures "necessary to preserve their liberties." Constitutional Democrats, cautioned Sargent, were the party of men who created the rebellion and the only politicians in the loyal North who sympathized with rebellion. The real reason that Democrats opposed the bill was to "embarrass" the government and prevent legislation "calculated to injure the rebels."³⁴³ Others, like Maine Republican Samuel Fessenden, were excited to see "Copperheads" drafted.

calmer and whine about their arbitrary arrest" and invasion of their homes had been tried, "allowed five minutes for brief prayer, and then shot or hung, there would have been less indulgence in treasonable practices and the Government would have found support where it now receives censure. *Ibid.*, 1273.

³⁴⁰ Kelley also pointed to the experiences during the War of 1812, where men who tried to interfere with army morale were given a summary trial by a "drumhead court-martial" and executed by Andrew Jackson's order.

³⁴¹ *Ibid.*, 1272 The bill let European powers know to "keep their fingers out of our pie, lest they may find concealed therein a steel trap with sudden and fatal spring."

³⁴² *Ibid.*, 998.

³⁴³ *Ibid.*

Still, some congressional Republicans appeared to avoid constitutional arguments when possible. In the House, Abram Olin reasoned that whatever imperfect details existed, they were of “minor consequence when compared with great importance of the measure itself.” He claimed that everyone was aware of the variety of modes often employed to avoid direct vote upon any measure brought before the House.³⁴⁴ Olin was blunt about his distaste for the ongoing constitutional debate over the Conscription Act. Claims of unconstitutionality were the last bastion of those without substantive objections. It was the “feeble device of still more feeble minds” used to assert that some proposed measure is unconstitutional when they can find no other objections. Unconstitutionality would be a “very grave objection,” but no argument in opposition to the bill had yet to be argued that Olin deemed “worthy of a moment’s consideration” and were “mere twaddle.”³⁴⁵ Attacking or voting against the measure because of the problem of “minor details” would be “unbecoming and unpatriotic” to Olin, since the government needed to be immediately clothed with power necessary for self-defense and preservation.

Through their responses to constitutional conservatives during the February congressional debate over conscription, constitutional nationalists set the template going forward as the debate moved to the press. For constitutional nationalists, it was apparent under Article I that Congress had enough power to conscript all able-bodied male citizens. The exigencies of the war and the needs of a strong, global nation made it necessary. They also continued to treat constitutional opposition to war measures like conscription as a sign of disloyalty. Thus, constitutional nationalists aimed to discredit constitutional conservatives as unserious, pro-secession Copperheads.

³⁴⁴ *Ibid.*, 1214.

³⁴⁵ *Ibid.*

The Final Tally

In a last-ditch effort on March 2, Senator Bayard to indefinitely postpone the Conscription Act. The motion would be the final vote on the bill. Only Bayard, John Carlile, Garrett Davis of Kentucky, Kennedy, Powell, Rice, Richardson, Saulsbury, Trumbell, James Wall and Unionist Robert Wilson of Missouri supported it, with the motion failing by vote of 35 to 11. Lyman Trumbell was the only Republican to support Bayard's motion. Likewise, Powell's proposed amendment to cover conscientious objectors fail 32 to 8.³⁴⁶ Still, one House amendment succeeded in altering the language of Section XI to read "during the present rebellion, not, however, exceeding the term of three years" instead of "during the war." Bayard used his time presenting an amendment to limit the extent of martial law to army encampments while reiterating that the Conscription Act's purpose was to extend military jurisdiction over all citizens.³⁴⁷ Saulsbury spoke again briefly, warning that including foreign citizens who had declared their intentions to become United States citizens as able-bodied persons under the act would "sow the seed of more difficulty than we are aware of." He urged that there was no need for the Senate to rush a bill that clearly had the support of much of the Senate.³⁴⁸ With that, weeks of intense Congressional debate over the Conscription Act ended. Even once the Senate passed the bill the night of the 28th, two days later, Senator Richardson was already demanding a repeal, given how many amendments to it were already being proposed.³⁴⁹ The bill was officially passed by the Senate on March 2nd and President Lincoln signed the bill into law the next day.³⁵⁰ Although constitutional conservatives had lost the first battle over the constitutionality of

³⁴⁶ Powell's attempt to alter to fix the price of substitutes at \$150 also failed.

³⁴⁷ *Ibid.*, 1390.

³⁴⁸ *Ibid.*, 1391.

³⁴⁹ *Ibid.*, 1443.

³⁵⁰ *Ibid.*, 1454.

conscription, they had not failed to get their constitutional on the record and they had managed to curtail some of features of the bill offensive to Republican and moderate constitutional conservatives. The fight had not been futile, however. The war over the constitutionality of the Conscription Act had only just begun.

CHAPTER III: CONTESTING THE CONSCRIPTION ACT IN NEW YORK

The summer of 1863 in New York City tends to bring to mind one lasting, violent image—the New York City Draft Riots. Starting on July 14th primarily Irish immigrants rampaged against the draft and made targets of the city’s African-American population for days. Troops had to stagger back from the killing fields of Gettysburg to quell the violence which, once over, left over a hundred dead. Democratic and Republican newspapers were quick to blame the other for the riots. For Republicans, they believed the cause of the riots lay with constitutional opposition to conscription. As James R. Gilmore claimed, the universal discontent in the city was “systematically fomented” by “pot-house politicians” especially in New York City who “haranguing in barrooms and on street corners, declared that the draft was unconstitutional.”³⁵¹

The partisan blame for the riots was linked to the ongoing press debate over the constitutionality of the conscription. Throughout 1863, New York’s Democratic and Republican newspapers frequently presented their readers with constitutional arguments about the Conscription Act. Public constitutional debate occurred in New York in two phases: first, after the Conscription Act’s passage in March and second, after the New York City Draft Riots in July and August. Similar debate occurred throughout the North from Chicago to Indiana to Connecticut, but the constitutional debate was amplified in New York’s newspapers. For both Democrats and Republicans, New York newspapers dominated Northern readership through the popularity of the *Herald*, the *Times* and the *World*. New York papers carried influence

³⁵¹ James R. Gilmore, “The New York ‘Tribune’ In the Draft Riots: The Story of a Member of the Staff Who Assisted in Arming the ‘Tribune’ Office,” *McClure’s*, 1895.

throughout the North as they were frequently reprinted in other states' partisan press. Included in the press debate were two prominent pamphlets addressing the core constitutional arguments against conscription. Both Dennis Mahoney and John J. Freedman's pamphlets highlighted the emphasis of constitutional conservatives on both federalism arguments and constitutional tradition and precedent. In addition to newspapers and pamphlets, constitutional conservatives in New York and beyond had public leadership in the statehouse. Governor Horatio Seymour embodied the strategy of constitutional conservatives that emphasized the need for a direct judicial challenge to establish the constitutionality of the Conscription Act. Seymour's strategy was to publicly argue that constitutional arguments were the best and proper source of opposition to the Conscription Act as opposed to any popular or violent actions.

In the midst of these public constitutional battles, New York courts saw their own legal skirmishes over the constitutionality of the Conscription Act in the summer and fall of 1863. Constitutional conservatives in New York ultimately lost the battle but the struggle over the constitutionality of the Conscription Act was close and contingent. In July and August, constitutional conservatives had a brief opportunity to defeat the Conscription Act in New York, as it was challenged directly in the State Supreme Court and struck down by a city judge. Some New York judges looked to preserve federalism by arguing state and federal judges were both competent to remedy unlawful detentions by federal enrollment officers acted outside their authority. City Judge John McCunn and State Supreme Court Judge William Leonard, both Democrats, sided against the government, while Judges Erasmus Darwin Smith and William Bacon argued that the rule of *Ableman* disallowed state courts from entertaining actions contesting the validity of the Conscription Act or other federal acts.³⁵² Although the key New

³⁵² All these cases occurred at the trial level. Under the New York Constitution of 1846, the Supreme Court held general jurisdiction over cases of law and equity with power to review judgments of the County courts and the

York state court cases rested upon jurisdiction questions, they still hinged on federalism and the expansion of federal dominion through the Conscription Act. Constitutional conservatives needed to keep the state courts open to challenges to the Conscription Act's constitutionality, while the government wished to protect itself from the ability of state courts to interfere in the process of carrying out conscription. For both constitutional conservatives and Republicans, denying state court jurisdiction in these cases challenging the Conscription Act was tantamount to upholding the Conscription Act itself. Ultimately, the battles inside New York courtrooms in 1863 were a loss for constitutional opponents of conscription but were protracted and hard-fought enough to reflect the stakes at hand.

First Press Debate: Public constitutional debate in March 1863

Before the constitutional battles reached the courts, engagement with the Conscription Act began with the public constitutional debates in the partisan press by Democratic and Republican newspaper editors. As Congress debated the act in February 1863, constitutional conservative voices were active. Consistent with the debate in Congress and later judicial action, the focus of constitutional conservatives was on federalism-based criticism of the act. On February 20, the Democratic Albany *Atlas & Argus* responded to the “new mode of raising troops” being brought about by Senator Wilson’s bill. In past wars, whenever the federal government required troops, it appealed to states to fill its quota, leaving states to choose their mode of filling those quotas. The *Atlas* warned that Wilson’s Conscription Bill entirely ignored state governments and repudiated their services. It provided that federal officers were to enroll the militia and to process the draft, with no role for the states. The measure was “suicidal,”

Courts of Common Pleas. Members of the Supreme Court rotated annually into the newly created Court of Appeals, the state’s highest level court.

“odious” and “unnecessary,” conservatives argued, since states themselves could draft to fill the quotas when necessary.³⁵³

Once the bill was passed on March 3, the partisan press reacted swiftly. Emblematic of the constitutional criticism levied at the Conscription Act were two pamphlets published in March by Democratic attorneys Dennis Mahoney and John Joseph Freedman. Mahoney’s pamphlet-the “Four Acts of Despotism”-attacked the Conscription Act, along with the Indemnity Bill, the Legal Tender Act, and the Tax Bill.³⁵⁴ Following the objections of constitutional conservatives in Congress, his pamphlet focused on federalism-based arguments. First, he denied the notion of implied powers. That an insurrection or rebellion existed did not vest the federal Government with any new authority or power that they did not previously possess.³⁵⁵ The Conscription Act “disregarded and violated” the reserved rights of the states by taking no notice upon states in acting directly upon individuals and subjecting them to the “immediate domination of Federal powers.” Both the Congress and the President through the Conscription Act reduced state governments to “subjection” and ignored state authority by usurping it. Additionally, like congressional constitutional conservatives, he believed the Second Amendment protected state militia power. According to Mahoney, the Conscription Act violated the Second Amendment by putting the state militias “out of existence” and turning American citizens into conscripts instead of subjects of the militia. The federal government only had the right to call out the state militias in accordance with state laws but had no right to call people out “against their will” to perform

³⁵³ “The New Mode of Raising Troops.” Albany Atlas & Argus. February 20, 1863. 2.

³⁵⁴ *Harper’s Magazine* noted that the combination of the Financial Act, the Conscription Act, the Habeas Corpus Act, and the Indemnity Act meant that the “entire resources of country, personal and material” were placed under the “absolute control of the President” with power “more ample” having never been assumed or confided to any ruler. Monthly Record of Current Events. *Harper’s new Monthly Magazine* 26, No. 155 (April 1863). 701.

³⁵⁵ The four acts of despotism: comprising I. The tax bill, with all the amendments. II. The finance bill. III. The conscription act. IV. The indemnity bill. With introductions and comments. D.A. Mahony, *The Four Acts of Despotism*, (New York, Van Evrie, Horton & co., 1863), 19.

military service in any manner outside of what conformed to the Constitution.³⁵⁶ It was as “monstrous an act of despotism” as ever attempted by the Government.³⁵⁷

While not the focus of the public constitutional debate, the unconstitutionality of the Indemnity Act was impossible to divorce from the Conscription Act’s defects. The Indemnity Act also destroyed the original structure of federalism by taking all state court jurisdiction and authority and transferring it to the federal courts. Mahoney’s complaints about the Indemnity Act largely followed those of Chilton Allen White, arguing that Congress could not freely divest all legislative authority and make the President a dictator.³⁵⁸ Significantly, he argued that if the Indemnity Bill could invest power in federal courts over traditional subjects of state jurisdiction like property suits, then Congress had “virtual authority to abolish or abrogate the state courts altogether.”³⁵⁹ Mahoney believed that the Indemnity Act hastened the affront to federalism created by the Conscription Act by ensuring citizens could not seek redress in state courts.

Mahoney’s pamphlet, however, only scratched the surface in comparison to John J. Freedman’s lengthy pamphlet. Like Mahoney, Freedman also emphasized arguments about federalism, but Freedman spent significantly more time on examining constitutional history. His thorough examination led him to believe there was no basis in the Constitution or the country’s history for national conscription. Freedman began by defining state sovereignty as sovereign states permanently united under a federal compact either formed a system of confederate states

³⁵⁶ *Ibid.*, 20.

³⁵⁷ *Ibid.*, 22. The act not only violated the Federal Constitution, but every state constitution and subjected every poor man to “military slavery.”

³⁵⁸ *Ibid.*, 28. The orders of the President were to be a defense “in all courts to any action, civil or criminal, pending or to be commenced,” a clear violation of due process. As Mahoney put it, “no monarch in the world” was invested with more power than the President was given by the Indemnity Act, which made his will “permanent law.”

³⁵⁹ *Ibid.*

or a supreme federal government.³⁶⁰ The powers granted to the federal government by the Constitution were limited and not intend to be construed with other powers before vested in states, as states retained the right to make all ordinarily proper laws not inconsistent with the powers of the federal government.³⁶¹

Freedman also carefully defined his interpretive approach as clearly in line with other constitutional conservatives and strict constructionists in his application of historic originalism. He noted that the “first and fundamental rule” in interpreting all instruments was to construe them according “to the sense of the terms and *the intention* of the parties.”³⁶² Freedman took the Blackstonian approach that the intent behind laws was found by its word, context, subject-matter, effects and consequences, or the “reason and spirit” of the law. As a general rule of construction, Freedman believed courts should not regard the consequences of a particular construction except when intent was doubtful or when fundamental principles were “overthrown” and the “general system of the law as previously practiced is departed from.”³⁶³ Applied to the Constitution, its nature and objects and scope and design were apparent from its structure and only ambiguous text required interpretation. Any explicitly granted powers should not be enlarged beyond the “fair scope of its terms.”³⁶⁴

Applying strict constructionism, Freedman looked to Congress’ Article I powers first. Congress’s power to “provide for organizing, arming, and disciplining the militia” reserved to

³⁶⁰ John Joseph Freedman, “Is the act, entitled ‘An Act for Enrolling and Calling Out the National Forces, and for Other Purposes,’ Commonly Called the Conscription Act, passed March 3, 1863, Constitutional or Not?” (New York: G.S. Diossy, 1863), 5-6. (Cornell University Library Collection)

³⁶¹ Quoting Justice Story, Freedman understood federalism to mean that the federal and state constitutions needed to be construed with reference to each other, with each limited in its power but supreme in their powers within the scope of their powers. *Ibid.*

³⁶² *Ibid.*, 7.

³⁶³ *Ibid.*, 41.

³⁶⁴ *Ibid.*, 11-12. Freedman did not entirely deny the doctrine of implied power, noting that the “natural import of a single clause should not be narrowed so as to exclude implied powers “*resulting from its character.*”

states the power to appoint officers and train the militia. Only when *in the actual service* of the United States was the power exclusive. For, him, the obvious meaning was Congress had power to arrange the militia into companies, regiments, brigades and divisions when employed in the service of the United States.³⁶⁵ States were limited under the precedent of *Houston v. Moore*, as state courts-martial could not add to or diminish the punishment applied by acts of Congress upon military delinquents.³⁶⁶ Once Congress acted, its laws for organization the militia were supreme. Freedman also understood *McCulloch v. Maryland* meant the “necessary and proper” clause made Congress the sole and ultimate judge of the necessity of certain means to carry out any expressly granted powers. In the case of conscription, Congress held implied powers for the purpose of “replenishing or increasing the regular army.” Yet, if every power was to be regarded as necessary because Congress deemed it so, they would have seemingly unlimited power and might pass laws for raising by conscription peacetime standing armies. This was not the case, Freedman said, because Congress was not the ultimate judge of its powers-the courts were.

To fully examine the scope of Congress’s powers over the militia, Freedman employed historic originalism and focused extensively upon its constitutional history. For Freedman, many of the framers made clear the limits of the federal government over the militia. He thought that the *entire* control over the militia was left to the states under the Articles of Confederation and any control not delegated to the federal government under the Constitution remained. This suggestion seemed to ignore much of the impetus behind the Constitutional convention to replace the Articles, but Freedman also stated that the founders learned the mistakes of the Articles which granted Congress no power to raise armies but only to make requisitions upon states for quotas. The intent of the framers, he argued, was to grant the power to raise a regular

³⁶⁵ *Ibid.*, 19.

³⁶⁶ *Ibid.*, 14.

standing army for such emergencies under exclusive federal control and should be raised “in a manner and by means consistent with the great principles of civil liberty.”³⁶⁷ Thus, given the universal opposition to a large standing army, the framers choose the option of putting the militia under the command of the national government in times of emergency.

Freedman believed that conscription was not an acceptable practice during ratification, as the broad understanding was that the regular army would always be raised by voluntary enlistment. He saw the power to “raise and support” armies as a distinct, independent power that did not apply to the militia. If it did, the Constitution would have a general authority making the subsequent provisions relating to the militia “worse than useless” and would only “tend to perplex and bewilder.”³⁶⁸ The “far sighted framers” foresaw that the regular army might not be sufficient for some cases and thus granted power to call out the militia in three specific exigencies. Freedman felt one should avoid assuming that the restrictions too were “superfluous, irrelevant, and immaterial,” as sovereign states were universally understood by the framers to maintain power over their militias.³⁶⁹ He felt that the Second Amendment only confirmed this understanding. It was added for the purpose of *further restricting* Congress’s powers over the militia. Finally, Freedman contended that because conscription was unknown at the time of the adoption and prior to 1787, the meaning of the words “to raise and support armies” did not include the power of conscription without the consent of state authorities.³⁷⁰ Press gangs existed

³⁶⁷ *Ibid.* Freedman gave several examples. He points to John Dickinson, who observed that states would never nor ought to give up all authority over the militia and proposed to restrain the general power to one-fourth of the time. *Ibid.*, 20. Anti-federalists like Luther Martin felt that the states would never give up power over the militia and George Mason believed that an exemption should have been granted to maintain state power over the militia for their own use.

³⁶⁸ *Ibid.*, 22.

³⁶⁹ *Ibid.* Freedman notes that every state constitution of the original thirteen states expressly reserved to states the same right to a well-regulated militia.

³⁷⁰ *Ibid.*, 49. (As evidence, he claimed that French and English dictionaries of the late 18th century had no word for “conscript” or “conscription.”)

in England by 1756, but conscription, Freedman argued, was not used to raise a regular standing army until the French Revolution.³⁷¹ Thus, the only accepted modes were voluntary enlistment or requisitions upon the states.³⁷²

Freedman did not see the history of the War of 1812 as supportive either, as the war witnessed a “collision of opinion” between the states and federal government, the outcome of which he felt supported limitations on federal power. He noted the actions of New England states to claim the militia could not be called out by the federal government outside of the specified exigencies in Article I and that state governors could judge whether those exigencies existed. Freedman saw Connecticut Chief Justice Daggett’s objections to conscription as particularly convincing. Daggett argued that if the power to “raise and support armies” was unlimited, it followed that citizens subject to militia duty could be converted into soldiers of the United States Army during war indefinitely. Daggett thought the power to “raise and support armies” only authorized Congress to do so in a manner and by means “consistent with the great principles of civil liberty” and it was “utterly inconsistent” to compel any man to become a soldier for life.³⁷³ Among politicians, Freedman saw New Hampshire Senator and jurist Jeremiah Mason as the key leader of constitutional resistance to conscription. In Mason’s November 1814 Senate speech, he argued no arbitrary power was more alarming than the danger of conscription, as “revolutionary measures can never, with safety, be resorted to by a regular Government.” He argued that the Congressional authority to “raise and support armies” was very limited and comprised their

³⁷¹ *Ibid.* He goes to say that Blackstone’s history of the English people and military power showed conscription for regular standing armies was unknown in 1780. Nothing should be more guarded against according to Blackstone and Montesquieu in a free state than making the military power a body too distinct from the people.

³⁷² *Ibid.*, 52. Freedman also notes that the only entry in Samuel Johnson’s 1755 dictionary was speaking of Roman Senators called *Patres Conscripti*.

³⁷³ *Ibid.*, 22.

whole power over the subject.³⁷⁴ Following Jeffersonian strict construction, the powers had to be construed according to the intentions and understandings of the people who made the Constitution consistent with the established rights of states.³⁷⁵ Thus, Freedman's account viewed the actions of New England Federalists objecting to conscription as laudable because their understandings of the constitutional limitations of federal power were authoritative.

Like most constitutional conservatives, Freedman believed that not only did the framers understand the federal power over the militia to be limited, the Supreme Court agreed. The 1820 case of *Houston v. Moore* was the key precedent, arising out of the War of 1812. *Houston v. Moore* settled questions about the national authority over the militia, as the Court decided that the militia when called into service of the United States were not considered in service until mustered in at "the place of rendezvous." Once the militia was called forth and entered into service of the United States, their character changed entirely from state to national and was exclusive.³⁷⁶ Applied to the Conscription Act, Freedman was certain that the act ignored *Houston's* rule. It did not "purport" to be passed under the purpose of calling forth the state militias, as it denied the rights of states to appoint officers and ignored all state authority by granting the President "full and arbitrary power" to assign drafted men to *any* corps, regiment or company as he saw fit.³⁷⁷ Instead, the federal government aimed to raise its own army on a "vast scale" without consulting the states by conscripting every male person and "consolidate them into one immense United States Army."

³⁷⁴ *Ibid.*, 44-45.

³⁷⁵ *Ibid.* As others arguing against conscription's constitutionality note, Mason thought the distinction between the two forces-militia and regular army-was understood by the people at the time of the formation of the Constitution.

³⁷⁶ *Ibid.*, 23-24.

³⁷⁷ *Ibid.*, 29. The act was manifestly "not founded upon and cannot be defended as being authorized" by any clause of the Constitution relating to the militia.

Freedman made clear through his approach to constitutional interpretation that he adhered to strict constructionism and historical originalism. Because he felt all clauses in the Constitution should be construed with reference to the whole and each other, he argued one must ensure different sections were understood so as to not be repugnant to each other. The clause to “raise and support armies” contained two unlimited grants of power that were distinct—the power to *support* armies and the power to *raise*. Yet, no one would argue that Congress had the power to “extort forced loans” as they could conscript individual citizens to “raise” an army and take men by force without state consent.³⁷⁸ The plea of necessity was the same in both cases and upholding this power would put it beyond the “fair scope” and “true import” of its terms by accepting implied powers. Freedman felt the framers would not grant the power with restrictions attached to it “but unfettered by any money-limitation, if the entire authority without any restriction whatever, not over the militia only, but over every abled-bodied man.” Otherwise, the provisions relating to the militia were made “worse than useless” and converted into “mere surplusage.”³⁷⁹ Freedman believed so deeply in the wisdom of the framers that it was not possible that these “practical and far-sighted men” deliberately inserted two clauses with the intent that they be freely disregarded should they become inconvenient to another clause with similar, more ample powers.

Freedman’s detailed consideration of constitutional history and the text led him to conclude that courts were bound to pronounce the act as unconstitutional and void because it was such a “palpable violation” of the Constitution’s founding principles. It was a settled principle to Freedman that every court as a matter of right and duty must declare every legislative act in

³⁷⁸ *Ibid.*, 35. As discussed later in the chapter, Freedman was wrong. This is exactly what Judge E. Darwin Smith argued in the April case upholding the 1862 Legal Tender Act.

³⁷⁹ *Ibid.*, 36.

violation of the Constitution null and void.³⁸⁰ Arguably, no other constitutional conservative so fully covered all the constitutional arguments against the Conscription Act. Reflecting the growing consensus among constitutional conservatives, his arguments concentrated almost exclusively on federalism and constitutional history.

Throughout March 1863, editorials and columns in Democratic newspapers shared similar sentiments to those in Freedman and Mahoney's pamphlets in emphasizing federalism-based objections. The *New York World* wrote of the "complete overthrow of the public liberties" and the "darkest hour" since the beginning of the war.³⁸¹ The *New York World* focused primarily on the threat to individual liberties by arbitrary power. They complained that the Conscription Act, along with the *Habeas Corpus* Act, allowed the President the "immense power" to command every able-bodied man while Congress removed any check on the abuse of the "enormous monetary and military power" granted the President. The threat of such arbitrary power was downright apocalyptic. The *World* hollowed that the President could send one of his "countless" provost marshals to any citizen's home in the "dead of night, drag him from his bed, hustle him away under the cover of darkness, plunge him in a distant and unknown dungeon, and allow his friends to know no more."³⁸² Other papers focused mostly on the threats to federalism. They focused on the unprecedented nature of the "fearful" Conscription Act that was "surely wholly unprecedented" in the country's history.³⁸³ The *Batsvia Times* claimed conscription was unprecedented because during the War of 1812, the New England states at the time declared themselves independent of the general government by refusing all aid of men, money or arms.

³⁸⁰ *Ibid.*, 60-62.

³⁸¹ "Copy of a Bill Which Levels a Most Terrible Blow at the Liberties of the Country-the Habeas Corpus Suspended-The President Virtually Made a Dictator," *New York World*, March 5, 1863.

³⁸² *Ibid.*

³⁸³ "Military Conscription," *Detroit Free Press*, March 20, 1863, 2 (reporting *Batsvia Times*).

The paper warned that the power now granted to the President under the Conscription Act to control a “vast army” called the “national forces” to “enforce his executive proclamations and decrees” issued illegally erected “in fact an imperial government upon the ruins of the Republic and the Constitution.”³⁸⁴

Publishing in Democratic newspapers, the anonymous “Old Democrat” argued the power to “raise and support armies” either granted Congress control over individual citizens to compel them to serve in the federal army or was a mere authority to raise and keep up an army.³⁸⁵ The language of the clause manifestly did not confer a grant of power over individual citizens because the same words of “raising” were constantly used elsewhere where it was clear no such grant was intended. The argument came down to different approaches to constitutional construction. The “Old Democrat” favored a “fair construction” which did not suggest that the power to “borrow money” allowed the government to compel citizens to procure loans or to enlist the labor of citizens to build roads under the power to “establish post roads.” The “necessary and proper” clause did not override this rule of construction and the Tenth Amendment explicitly left no room for the implied power to compel citizens to serve in the army. Such power, he reasoned, must have been affirmatively given to Congress or fairly implied from the language used. The “Old Democrat” understood the Revolutionary generation would not have granted the general government a right to raise armies denied to the Crown and even to the “omnipotent Parliament.” Daniel Webster’s 1814 speech against James Monroe’s Conscription bill was further evidence conscription was “utterly repugnant” to the Constitution. Like the *Batsvia Times*, the “Old Democrat” cryptically foretold his readers that the threat was dire and ominous. The “obliteration” of Constitution had to be stopped or despotism would reign

³⁸⁴ *Ibid.*

³⁸⁵ “The Constitutionality of the Conscription Law, Number IV,” *Atlas & Argus*, April 18, 1863, 2.

over the country with personal liberties at the pleasure of the President without the constitutional safeguard of federalism.

New York Republican and pro-administration newspapers responded in kind, constructing their own constitutional responses. James Gordon Bennett Sr.'s *Herald*, a politically independent newspaper, saw the Conscription Act as a dramatic expansion of federal power which endowed Lincoln with "extraordinary powers." They admitted these powers effectively made him a temporary dictator by placing the militia of all the States, the finances of the whole country and the liberties of all the people all under his control.³⁸⁶ But the *Herald* felt the Union was worth the price of a temporary dictatorship and the Constitution gave Congress the right to grant the President supreme authority in cases of war or invasion. Even though Jefferson Davis was granted similar powers under Confederate conscription, Lincoln possessed "his powers constitutionally and by consent of Congress, while Jeff. Davis is a usurper." Even if the Democratic charge that conscription entailed a novel expansion of federal power, the act remained both constitutional and necessary.

Like the Republicans in Congress, editors of New York Republican newspapers argued both that the Constitution gave Congress ample powers over the militia and that the constitutional conservative arguments against conscription were tantamount to disloyalty. The *New York Observer* looked to address the "systematic and persistent efforts" being made by "disloyal presses and politicians" against the act making it the duty of all loyal newspapers to "use every effort to uphold constitutional law."³⁸⁷ The *Observer* argued the five Article I powers over the armed forces when combined with the "necessary and proper" clause gave the national

³⁸⁶ "The Duty of the President and the People," *New York Herald*, March 6, 1863.

³⁸⁷ "The Conscription Act: Its Constitutionality Vindicated," *New York Observer and Chronicle*, March 26, 1863, 41.

government the “entire and exclusive control in raising, supporting, governing and regulating the army and navy.”³⁸⁸ It was, the editors said, “difficult to conceive” of more clear language giving Congress the exclusive power to judge and determine what means were “necessary and proper” to raise an army. Choosing between the old, traditional method of volunteer enlistment or a draft was a matter of choice for Congress, as the power to “raise and support” armies could was not intended to create dependence on state governments for execution of this “most vital power.”³⁸⁹ This, the *Observer* felt, hit “the nail on the very head” against arguments which held state authority paramount-the “true South Carolina theory” and the “parent of nullification and rebellion.”³⁹⁰ Republican newspapers both agreed with the notion that conscription was unconstitutional and aimed to render such notions obsolete by tarnishing them as nullification.³⁹¹

Thus, other Republican papers felt that not only were constitutional conservative arguments against the act disloyal, but part of a strategy to “embarrass and weaken the government.” They accused “Copperheads” of making “wild tirades against” and “incessantly” denouncing Lincoln’s unconstitutional acts because they saw state court judges as the “precious

³⁸⁸ *Ibid.* Referring to the power to “raise and support” armies, the power to “provide and maintain a navy,” the power to make rules to govern and regulate the land and naval forces, the power to call forth the militia, and the power to provide for organizing and disciplining the militia when called into service.

³⁸⁹ Under the rule of *McCulloch v. Maryland*, Congress was allowed discretion with “respect to the means by which the powers it confers are to be carried into execution” and where the law was not prohibited, the Court would not inquire into the “degree of its necessity.” *Ibid.*; *McCulloch v. Maryland*, 4 Wheaton 316, 424 (1819). “No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States.”; “A Defense of the Conscription Bill,” *Albany New York Evening Journal*, March 31, 1863. *McCulloch* showed that “immutable rules” were “unwise,” as the Court could not interpret the Constitution to limit the choice of means so narrowly and that the government had by the Constitution every “incidental power” that was necessary to carry its grants of power into force and effect.

³⁹⁰ “The Conscription Act,” *New York Observer*, 41. The Conscription Act also did not depend on the clauses related to the militia and had *no* connection with them, something the “most careless reader can see,” given the previously Article I grants of power over the whole subject of raising armies.

³⁹¹ The *Observer*’s editorial ended on a curious note, as they argued that the Fugitive Slave Law had been pronounced constitutional by the Courts and enforced by the Government, so that the Conscription Act too would be sustained if called into question judicially. This line of argument seemed to implicitly accept the similarity of the acts, at least so far as they required the presence of federal officers in states and direct enforcement upon citizens.

champions of law” before which Democrats could “cripple” government.³⁹² Therefore, Republican papers thought Democrats aimed to use state courts to bring about a “violent collision” between the martial authorities of the government and the people.³⁹³ Still, the *Times* were optimistic that the Supreme Court would endorse the constitutional validity of every key war measure and doubted that the “Copperheads” wanted an actual test of the constitutionality of these acts, since they were aware it would “take the wind out of all their empty clamor about usurpation and tyranny.” Republican papers like the *Times* thus both believe Democrats wished to cripple the federal government but doubted they could ever do more than succeed before state courts.

Republican newspaper editors questioned the sincerity of the judicial strategy of constitutional conservatives while being confident conscription was amply supported by both the Constitution and the necessities of war. By the end of July, constitutional positions had been staked out by both Republicans and constitutional conservatives before any major courtroom battles occurred. By the time courtroom activity grew in the summer, the New York City Draft Riots brought about a second press debate, with both sides reminding their readers of the constitutional arguments they initially brought forth in March.

First Round of Court Challenges to the Conscription Act

New York’s courts would see a flurry of activity in the summer of 1863 involving both the constitutionality of conscription and state court *habeas* jurisdiction over challenges to the constitutionality of federal acts. The outcome of this first round was a minor victory for constitutional conservatives who convinced City Judge John McCunn the act was unconstitutional. In the months before McCunn’s decision, the first significant judicial actions

³⁹² “The Copperheads and the Courts,” *New York Times*, March 13, 1863, 4.

³⁹³ *Ibid.*

came not from cases directly challenging the Conscription Act, but from judges using their positions to rebut constitutional conservative arguments against the act. First, in April, War Democrat Judge Erasmus Darwin Smith used an opinion upholding the constitutionality of the 1862 Legal Tender Act to declare national conscription constitutional. In *Hague v. Powers*, Smith argued that the Constitution imbued the federal government with sovereignty and supremacy, including the powers of imposing taxes for the national defense and general welfare and "appropriate" powers for common defense and general welfare.³⁹⁴ He felt the proper rule of construction to apply to further the "great objects of the grant."³⁹⁵ Because the Constitution conferred powers in general terms, consequently every grant held incidental and implied powers.

Like the absolute and unqualified authority to tax, Congress' power to "raise and support armies" allowed them to provide for "calling upon, impressing and compelling every citizen personally to aid in carrying on the war it has declared." The power included "*any and every* means adapted to the end of war, in the opinion and discretion of Congress." Therefore, Smith argued Congress could take "every ship of our citizens and appropriate it to the public use to constitute a navy."³⁹⁶ He went so far as to argue the Government could even lawfully seize and appropriate the property of any citizen for public use or seize and appropriate property without limit to carry on the war, including *forced loans*.³⁹⁷ Smith was certain that the federal government's power under the Constitution were more than sufficient to meet the necessities of war. With the war ever-present in his mind, he wrote that it would be "exceedingly unfortunate"

³⁹⁴ "Decision of the Supreme Court, of the State of New York, Sustaining the Constitutionality of Legal Tender Notes, Delivered at Rochester, April 4, 1863 (Rochester: A. Strong & Co. Printers, 1863), 8. Accessed at New York Historical Society.

³⁹⁵ For Smith, the existence of a written constitution with enumerated powers did not make the powers "less ample."

³⁹⁶ *Ibid.*, 17.

³⁹⁷ *Ibid.*, 18-19.

if New York's judiciary or any branch of the Superior Courts "should have felt constrained to declare an Act of such great public importance to be in conflict with the fundamental law."³⁹⁸

Smith was not the only judge to use best available opportunity on the bench to defend the Conscription Act.

In late May, Federal District Judge Nathan K. Hall gave a grand jury charge supporting the constitutionality of the Conscription Act.³⁹⁹ Hall's charge was notable both for its strong support of conscription and his political opposition to the Lincoln Administration. Hall admonished the Grand Jury that he was "aware that partisan newspapers had urged that the law was unconstitutional" but that he saw "no reason to doubt that Congress had the constitutional authority" to pass the law such as the safety of the country required.⁴⁰⁰ The Constitution, with certain limitations, gave Congress the power to "raise and support armies" and Hall argued this meant that whenever Congress exercised that authority, those laws were to be "administered and enforced by courts and juries." That the law was unwise did not make it unconstitutional. Hall preached deference, believing constitutional questions regarding the Conscription Act were best left to the legislature, not the judiciary, and that it was necessary for judges to enforce all constitutional laws without "attempting to modify such laws."⁴⁰¹ Like Smith, he argued for judicial restraint from overturning reasonable legislative action needed to fight the Civil War.

³⁹⁸ *Ibid.*, 19. In a concurrence, Justice Johnson agreed that the war might require the Constitution to be suspended to save the government. In October, by a 6-2 majority, the New York Court of Appeals affirmed the Supreme Court's decision in *Hague*, finding that notes issued under the February 1862 act were valid as payment for debts, private and public, based on Congress's Article I power to borrow money on the credit of the United States. Two judges dissenting, including a Republican, Judge Selden, who faced criticism from the Republican press for his position. See "Our New York Correspondence: The Legal Tender Question," *The Daily Picayune*, October 15, 1863, 2.

³⁹⁹ Hall had been President Fillmore's Postmaster General.

⁴⁰⁰ "The Conscription Act," *Chicago Tribune*, May 25, 1863. 2.

⁴⁰¹ *Ibid.* Hall cited the teachings of Marshall, Webster, and Story for the notion that departments were distinct and courts should not impeach the wisdom of legislative acts.

By the end of May, constitutional conservatives had seen their arguments against conscription twice summarily dismissed by judges. They would lose again in early June, when Fifth District Judge William Johnson Bacon denied the John Beswick's appeal for a writ of *habeas corpus*.⁴⁰² Beswick enrolled in August, 1861, claiming to be 18 and did so without the written or verbal consent of his parents, who sued for a writ in Beswick's name for release from military custody. For Bacon, the federal government's power in the area was clear. Had Beswick been in fact eighteen at the time of his enlistment, the enlistment would have been "perfectly valid, without any consent whatever of his parents" since the federal government had a right "whenever it thinks the exigencies of the country require it, to command the services of any of its citizens, and it is the sole judge of that necessity."⁴⁰³ State courts, in this instance, were not to "interpose to shield a soldier who owes a duty to the government from his just responsibility to the law to which he is subject, and which has jurisdiction of the offence and the offender."⁴⁰⁴ *Beswick*, though a brisk opinion which did not directly address conscription, suggested very broad powers of the federal government over its citizens to compel them into military service while counseling state courts against releasing soldiers from the army. Like Smith and Hall, Bacon made clear he was unwilling to accept the arguments of constitutional conservatives against conscription.

Despite the early losing streak, constitutional conservatives finally scored a victory in July. The victory would come while the city was in disarray, as judicial battles over conscription continued throughout the chaotic violence of the draft riots. On Tuesday, July 14th, just as the

⁴⁰² Bacon served a total of 16 years on the Court from 1854-1870, concurring in the court's 1860 antislavery decision *Lemmon v. People*. After his time on the court, he would serve as a Republican congressman in 1877.

⁴⁰³ *In Re Beswick*, 25 How. Pr. 149, 151. (N.Y. 1863)

⁴⁰⁴ *Ibid.*, 156.

riots were breaking out, Henry Biesel contested his arrest by two enrolling officers before Judge John H. McCunn of the New York City Court of General Sessions.⁴⁰⁵ McCunn had a reputation as a “vociferous and extreme Democrat.”⁴⁰⁶ During the riots, one newspaper correspondent claimed that McCunn was held up at Governor Seymour’s headquarters at the St. Nicholas Hotel, giving advice along the radical former mayor Fernando Wood and “other political and judicial luminaries of that caliber.”⁴⁰⁷ Another report suggested McCunn tried to interfere with Colonel Mayer’s attempt to disperse a lynch mob on the West Side attacking black residents.⁴⁰⁸ His reputation was such that the *Pittsburgh Inquirer* openly called for the abolishing of the Superior Court altogether in order to “lawfully dispense” of McCunn, an “indelible disgrace” to the city.⁴⁰⁹

McCunn therefore surprised none of his voracious critics when he found that not only had the arrest of Biesel was a violated New York criminal law, but that the underlying Conscription Act empowering the two enrolling officers was unconstitutional.⁴¹⁰ His opinion paralleled

⁴⁰⁵ The *New York Times* reported that two enrolling officers, Stephens and Dodge, entered a family business on Seventh Avenue in New York City run by a father and son named Biesel. Stephens demanded the younger man’s names and claimed he did not respond. Stephens seized Henry Biesel and handcuffed him, drew his pistol and then threatened to shoot Henry Biesel’s father. Stephens then arrested Henry Biesel and committed to the Park Barracks. “Judge McCunn on Conscription. The Validity of the Law Denied,” *New York Times*, July 15, 1863.

⁴⁰⁶ Mark Neely, *Lincoln and the Triumph of Nation* (Chapel Hill: University of North Carolina Press, 2011), 175. McCunn was an Irish immigrant who had left the bench to join the 69th regiment and later former the 37th New York Volunteers in June 1861, which he was commissioned colonel of. McCunn fought well at Malvern Hill and made a Brevet Brigadier General, but left the army after being threatened with court martial after disparaging his commanding officer and being deemed “wholly incompetent” by his fellow officers. Thomas P. Lowry, *Curmudgeons, Drunkards, and Outright Fools: Courts-Martial of the Civil War Colonels*, (Lincoln: University of Nebraska Press, 2003) 47-51. McCunn was in fact brought before the courts martial in 1861 for dismissing the request of a Lieutenant under orders of the Provost Marshal. In his written statement before the courts martial, McCunn wrote that, “I quit my high position and my happy home to assist my country and this is my reward. Notwithstanding, I will stand by the old flag that afforded me shelter...stand by the Constitution under which I have brought myself from poverty to plenty.” *Ibid* at 48.

⁴⁰⁷ “Our New York Letter, July 21, 1863,” *Philadelphia Inquirer*, July 21, 1863. 8.

⁴⁰⁸ Bernstein, *The New York City Draft Riots* at 59. McCunn apparently told Mayer he was acting under the authority of Governor Seymour and had orders not to fire upon the mob.

⁴⁰⁹ “Our New York Letter.” *Pittsburgh Inquirer*, Nov. 6, 1863, 2.

⁴¹⁰ “The Conscription Act: A New York Judge Denies the Validity of the Law,” *The Baltimore Sun*, July 16, 1863. 1; “The Conscription Law Unconstitutional-Important Case Before Judge McCunn,” *People’s Friend* (Indiana), July 22, 1863. 2 The Second Revised Statutes made it a misdemeanor for any officer or person pretending

constitutional conservatives arguments made in the public constitutional debates by emphasizing federalism-based arguments and constitutional history. The entire act was “clearly unconstitutional” because it both violated the rights of the citizens by creating arbitrary distinctions among them but also contravened the Article I power to “raise and support armies” and to “provide for calling forth the militia.” McCunn argued that those powers only provided for the standing army of the country and not for volunteer or temporary forces demanded by emergencies. The Conscription Act incorporated the militia into the standing armies of the United States instead of merely increasing the size of the regular army. Further, the Second Amendment and Article II, which made the President Commander-in-Chief of the army *and* the militia, suggested to McCunn a strong distinction between those forces. Thus, the President could only call upon the regular army and navy and the militia separately. McCunn ended his decision by agreeing with Governor Seymour as to the necessity of a judicial solution. The people needed to show “patience and patriotism” so the courts could fully determine the question of conscription, for the courts were “able and equal to the duty of sustaining the rights of the citizens” and it was through the courts alone that rights were fully and properly protected. Constitutional conservatives had scored a victory, but it was quickly curtailed by both the actions of higher New York Courts and the federal government’s emerging legal strategy of avoidance.

The federal government learned the same lesson from McCunn’s decision they would in Pennsylvania later in the year-Democratic judges, especially state judges, were to be avoided if possible. In a case heard days after *Biesel’s Case*, another constitutional challenge to the Conscription Law was brought before Democratic Judge George G. Barnard of the New York

to be an officer to arrest anyone or detain them against his will “without any legal process or other legal authority.” He found that Section 25 of the act did not protect the arresting officer Stephens because it was no offense to refuse to give a name to enrolling officers.

Supreme Court.⁴¹¹ To the disappointment of constitutional conservatives, the proceedings ended quickly when Dr. McCaulay was returned by the United States Marshal. The New York *Herald* reported that federal authorities were “determined to give no excuse, if possible, to the state courts to investigate the question of constitutionality” and thus they “resorted to the short method of releasing the prisoner charged with resisting the draft.”⁴¹² Under Provost Marshal General James Barnett Fry, United States commissioners were to dismiss the complaints of any other persons under arrest on similar charges without waiting for the state courts to act. Indeed, days later in Kings County, Colonel Burke, the commander of Fort Lafayette, refused obedience to the writs of New York state courts and repulsed the sheriff of Kings County by military force. Newspapers printed instructions from Washington to Provost Marshal Nugent to “not make returns hereafter to writs of *habeas corpus* issued by state judges, further than to state in a respectful manner that such writs must be obtained from judges of the United States Courts, when the United States is a part to the proceedings.”⁴¹³ By this juncture, the federal government had officially adopted a strategy of avoidance for constitutional challenges in state courts.

The federal government may have avoided another test of the Conscription Act before a Democratic judge, but McCunn continued to release prisoners by *habeas corpus* throughout July.⁴¹⁴ McCunn’s actions would be short-lived. At the turn of the month, the New York Supreme Court decided in *People v. Louis Nash* that McCunn, as a city judge, had no right to

⁴¹¹ Like McCunn, Barnard was a well-known Democrat who was present on the first day of the riots at Mayor Opdyke’s Fifth Avenue home. Barnard, like McCunn, would face impeachment by the New York Senate in 1872 for corruption related to Tammany Hall. *Doomed by Cartoon: How Thomas Nast and the New York Times Brought down Boss Tweed and His Ring of Thieves*, ed. John Adler & Draper Hill (Morgan James Publishing, 2008), 216.

⁴¹² “Constitutionality of the Conscription Act. Supreme Court-in Chambers. Before Justice Barnard,” *New York Herald*, July 19, 1863, 4.

⁴¹³ “A Dangerous Conflict Between the State and Federal Authorities of New York,” *People’s Friend* (Indiana), July 22, 1863, 2.

⁴¹⁴ “Another Writ of Habeas Corpus Obtained for Boyle. Before City Judge McCunn, at Chambers,” *New York Herald*, July 19, 1863, 4.

issue a writ of *habeas corpus*.⁴¹⁵ McCunn apparently gave notice that he would carry the decision before the Court of Appeals in order to defend his determination that the Conscription Bill was unconstitutional and to grant “*habeas corpus* (to) every man drafted if applied to do so.”⁴¹⁶ McCunn never got the opportunity. More judicial challenges would come at the close of the year, but constitutional conservatives’ best chance to successfully challenge the Conscription Act ended when higher New York judges agreed that the city courts did not have jurisdiction over such cases. Meanwhile, the events of the draft riots had renewed the public constitutional debate over conscription in the partisan press. Republicans blamed the riots upon constitutional opposition to conscripted, which stoked the flames of constitutional conservative commitment to winning the public constitutional debate even as their luck began to turn in the courts.

The Draft Riots and the Second Press Debate

Amidst the visceral physical violence and death caused by the draft riots, many Republicans and War Democrats had little doubt that the fight over the constitutionality of the Conscription Act was the primary cause of the riots. As historian Melinda Lawson notes, their worst fears were realized by the violence in New York City’s streets and they blamed Democrats and the Democratic press for the riots.⁴¹⁷ Thus, the constitutional values of constitutional conservatives were directly at fault. Republicans blamed Governor Seymour for having “purposely denuded the city of militia so as to give an opportunity for the riot” and decided to haggle over constitutional rights at a “most inopportune time.”⁴¹⁸ Although the riot was not a

⁴¹⁵ “Supreme Court-General Term: The Question of the Right of the City Judge to Issue Writs of Habeas Corpus-Decision of the Supreme Court Against It,” *New York Herald*, August 2, 1863 (Before Judges Suther, Clerke, and Barnard, another well-known Democrat)

⁴¹⁶ “Our New York Letter,” *Philadelphia Inquirer*, August 2, 1863, 3.

⁴¹⁷ Melinda Lawson, *Patriot Fires*, 96.

⁴¹⁸ Stephen D. Engle, *Gathering to Save a Nation: Lincoln and the Union’s War Governors* (Chapel Hill: University of North Carolina Press, 2016), 317.

form of popular constitutional action, Republicans believed constitutional arguments were a primary cause of the riots even in actuality.

Seymour's actions to send thousands of state militia members to aid Pennsylvania against General Lee's invasion was evidence of the Democratic conspiracy, not principled conservatism. Similarly, Secretary of the Navy Gideon Welles commented in his diary that the riots were the "fruit of the seed sown by (Governor Seymour) and others." Philadelphian Robert A. Maxwell wrote to President Lincoln that the whole country was "observing with interest the course of the Administration in dealing with the New York Conscription" and "if not preceded," the Union "goes up in a blaze of state rights."⁴¹⁹ New York lawyer John Clarkson Jay, abolitionist grandchild of founding father John Jay, wrote Secretary of War Edwin Stanton that he was convinced the "secession leaders of the north have for two years hoped for an opportunity of resisting the national authority under colors on pretense of state authority."⁴²⁰ Stanton likewise complained to New York attorney and War Democrat James T. Brady that Seymour stood on the "platform of Slidell, Davis, and Benjamin; and if he is to be judged whether the Conscription Act is constitutional and may be enforced or resisted as he or other state authorities may decide, then the rebellion is consummated, and that national government abolished." In the wake of the draft riots, constitutional nationalists viscerally recoiled at constitutional objections to conscription, which now appeared to be a literal assault on the government.

⁴¹⁹ *Ibid.*, 318.

⁴²⁰ *Ibid.* The *Philadelphia Age* referred to the "Copperhead Conspiracy in New York," casting Democrats as "Jacobins" whose "treasonable teachings" that followed the "conceited dogmatism and the "contempt for law and authority," displayed by the War of 1812 Hartford Convention. "The Copperhead Conspiracy in New York," *Philadelphia Weekly Age*, August 1, 1863. Similar arguments would appear in the *Daily Standard* and *Evening Journal* highlighting the striking similarities between the constitutional arguments of Democrats in 1863 and Federalists in 1814, with the *Evening Journal* accusing the *Democratic Argus* of "plagiarizing" from the Hartford Convention and the "Blue Light" agitators of 1812 in complaining that conscription broke up independent state authority to control their militias and fill the quotas. "The Draft Unconstitutional," *Evening Journal*, July 27, 1863, 2; "Historic Parallels," *Daily Standard*, August 1, 1863, 2.

A resurgent debate over the Conscription Act followed as constitutional nationalists reiterated their constitutional support for the Conscription Act and attacked constitutional conservatives as hypocrites. Horace Greeley's New York *Tribune* imagined the riots as resulting from a Democratic conspiracy agreed to with "considerable unanimity" to array the state against the national government through use of the writ of *habeas corpus* in the state courts to nullify the Conscription Act.⁴²¹ Likely referring to the judicial actions of McCunn, the apparent plan called for any draftees to sue for a writ of *habeas corpus* from a state court presided over by a "disloyal judge" who would pronounce the Conscription Act unconstitutional and discharge the conscript.⁴²² The *Tribune* suggested this was why Provost Marshal General Fry directed his subordinates not to produce the deserter or conscript before a state court in response to a writ of *habeas corpus*. The *Tribune* argued that *Ableman v. Booth* had already decided state courts could not decide the constitutionality of federal law like the Conscription Act by writ of *habeas corpus*.⁴²³ Democratic papers and politicians were chided as hypocrites who exalted over Taney's opinion in *Ableman* when it affected citizens whose crime was refusal to be an accomplice to slave hunting, but showed their politics when they refused the same process to enforce a law "vital to the safety of the Republic."

⁴²¹ "Doses for Copperheads: The Habeas Corpus Dodge-Law for Conspirators," *Chicago Tribune*, July 29, 1863, 2 (reporting "Constitutionality of the Conscription," *New York Tribune*, July 25, 1863)

⁴²² In John Jay's letter to Edwin Stanton from July 18, he also claimed knowledge of such a Democratic plan-citing the testimony of one Democrat who claimed 5,000 had pledged themselves to this plan-one which accorded with "secession states' right doctrine," promoted by Democratic newspapers, and which would treat any refusal by the federal government to recognize state court jurisdiction as "armed conflict" between two competing governments. *United States War Department, The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Series III, Volume III* (Washington: 1899), 541.

⁴²³ The Wisconsin Supreme Court had released from custody of a United States Marshal for aiding and abetting the escape of an alleged fugitive slave on the ground that the Fugitive Slave Act was unconstitutional-"exactly the ground on which it is now proposed that a conscript shall be discharged, so that the two cases are in all respects identical." "Doses for Copperheads," *Chicago Tribune*, July 29, 1863, 2 *Ableman* made it the duty of the Marshal not obey the state authority and to make it known to the state judge that he holds the prisoner under United States process, which superseded the state writ of *habeas*. *Ibid*.

Whether state courts had jurisdiction over such challenges, constitutional nationalist remained confident that conscription was constitutional. As congressional constitutional nationalists argued, Republican and pro-administration newspapers looked to the combined Article I powers over the armed forces combined with the “necessary and proper” as granting Congress “bold and naked power.” The Constitution put *all* military power in the hands of the national government and only returned power to the states under the Second Amendment, which did not deny Congress the power to “raise and maintain armies in any manner” but only secured to states the right to a “well-regulated militia.”⁴²⁴ Conscription would only be unconstitutional if the Constitution provided for *only* a militia force to be called on by Congress. Thus, they believed that no lawyer in good standing was willing to present arguments against the act as his own and no court would accept them—even the “extremely conservative” Judge Cadwalader of Philadelphia found the act constitutional.⁴²⁵ Republicans remained convinced that Congress’ power to conscript was so clearly granted in Article I that constitutional conservatives’ claims were obviously erroneous.

Democratic newspapers were no less apocryphal in their language, blaming the riots on the odious, oppressive Conscription Act. The *Philadelphia Age* claimed that there was “deep-seated opposition” to the Conscription Act throughout the city and the ballot-box would be the place to record “their verdict against a party that draws a line of division between the rich and poor.”⁴²⁶ A few voices argued that the riots were in support of constitutional arguments against

⁴²⁴ *Ibid.*

⁴²⁵ “The Draft Constitutional,” *New York Daily Tribune*, July 25, 1863, 4 (quoting Cadwalader from *McCall’s Case* that under the power to “raise armies,” Congress could use conscription to raise both regular national armies and the militia from the several states during a crisis of “extreme exigency”). *McCall’s Case*, which in fact dealt with the Militia Act of 1862, is discussed in chapter four.

⁴²⁶ “The Draft in the Stewes,” *Philadelphia Weekly Age*, August 1, 1863. The *Age* both upheld the righteousness of opposition to the Conscription Act while opposing violent resistance in favor of the lawful solutions of regular politics and the courts.

conscription, but these were the exception. A German writer wrote that opposition to the Conscription Act was based on the conviction that it was unconstitutional and “at war with state rights,” a universal belief “deep seated” among law-abiding Democratic Germans. German conscription, if it could be “so termed,” had no features in common with “our odious and oppressive statute” because the Prussian system had no exemptions with regard to wealth or station and no substitutes or commutations.⁴²⁷

Most Democratic and constitutional conservatives did not claim the riot was a form of popular constitutional action, instead focusing on defending their constitutional arguments against Republican attacks. The *Sunday Mercury* proclaimed the truth was that the federal government was essentially a “very weak and dependent affair” with “no population, no money, no soldiers, no powers, no anything of its own” and was a “mere creature of the states, and without the states it is nothing!”⁴²⁸ Thus, it was “absurd” to broach the idea of “wiping out the states” as the two governments were meant to be “kept strictly within their respective spheres.”⁴²⁹ For some Democrats, the federal government’s response to the draft riots was proof that the Conscription Act resulted from the rise of a tyrannical, consolidated federal government.

The most widely read Democratic paper, New York *World*, argued no Democrat denied the federal government’s “ample authority” to compel all military service necessary to maintain the Constitution, enforce the laws and repel invasion, yet it could not enact conscription.⁴³⁰ The *World* turned to the key constitutional conservative argument that Article I used two terms—“armies” and “militia”—under the power to “raise and support armies,” while the power to

⁴²⁷ “The Germans and the Conscription,” *Johnstown Democrat*, July 29, 1863, 2. (reprinting *New York World*)

⁴²⁸ “The States and the Federal Government,” *Sunday Mercury*, August 1, 1863.

⁴²⁹ *Ibid.*

⁴³⁰ “A Legal Aspect of the Draft,” *Harrisburg Patriot & Union*, September 1, 1863, 1.

provide for “calling forth the militia” and the Second Amendment referred to a “well-regulated militia.” The army belonged exclusively to the United States, whereas the militia was a creature of the states which existed prior to the Constitution. Militia duty was created by state citizenship and was an obligation of civic duty, whereas regular army soldiers were under contractual duties. Thus, constitutional conservatives again did not doubt that states could force all its citizens into the *militia* by draft. After the draft riots, they reiterated federalism-based arguments to prove the unconstitutionality of conscription. Soon after, constitutional conservative leader Governor Seymour engaged in a public debate with President Lincoln and his administration over the constitutionality of conscription. Seymour reiterated core federalism arguments while pressing for a judicial solution. His campaign was, like the court challenges to conscription, ultimately unsuccessful, but it also spurred other like-minded politicians and citizens to support his position.⁴³¹

Horatio Seymour: Constitutional Conservative Leader, Debates the Lincoln

Administration

Democratic New York Governor Horatio Seymour was a key constitutional conservative who emphasized the importance of getting a judicial resolution as to the constitutionality of the Conscription Act. Even before the act passed in March, Seymour, citing his strict constructionism, publicly spoke out against conscription as unconstitutional.⁴³² He frequently not only welcomed the use of courts, but championed them as the proper venues and an alternative to civil unrest and violence. The events of the summer only heightened Seymour’s commitment to a

⁴³¹ There was dissent on this position. For instance, Chauncy C. Burr's *Old Guard*, criticizing the New Jersey legislature's resolutions passed in March in response to the Conscription Act, which called for treating "certain laws" which were unjust and unconstitutional as law until overturned by the proper judicial tribunals or by the ballot box, because unconstitutional laws were not in fact law. Burr counseled active resistance, and while he should look to the courts, the state executive and legislature were also bound citizens against unconstitutional and oppressive acts. "How to Treat an Unconstitutional Act of Congress," *The Old Guard*, May 1863, 1-5.

⁴³² William B. Hesseltine, *Lincoln and the War Governors* (New York: A.A. Knopf, 1948), 27.

judicial solution. His August 18 proclamation, just over a month after the New York City draft riots, argued against “disorderly and riotous attacks” upon those engaged in executing a law of Congress. Seymour argued that the “liberties of our country and the rights of our citizens can only be preserved by a just regard for legal obligations and an acquiescence in the decisions of judicial tribunals.” Thus, he reasoned the “wise and humane policy” would have already procured a judicial decision with regards to the constitutionality of the Conscription Act, the lack of such a decision did not justify violent opposition.⁴³³ Disregard for the sacredness of the Constitution, the law, and the decision of judicial proceedings was the greatest danger to liberty. Seymour ended by repeating his warnings and arguing that the “only opposition to the Constitution which can be allowed is an appeal to the Courts.”⁴³⁴ Seymour emphasized these same arguments in his correspondence with Lincoln and his administration in August.

The correspondence between Seymour and Lincoln was shared in the New York City press as part of the public constitutional debate. Seymour mainly reiterated what he had already argued in other venues—a judicial resolution was required on the question of conscription. His letter to Lincoln expressed this desire, as well as his certainty that conscription was unconstitutional.⁴³⁵ Seymour believed that at least half the people believed the Conscription Act to be unconstitutional, a view he suggested “profoundly excites the public mind.” Clearly

⁴³³ “The Draft in New York: It Is To Take Place Today.” *Chicago Tribune*, August 19, 1863. 1; “Proclamation B Horatio Seymour, Governor of the State of New York, August 1, 1863,” *Atlas & Argus*, August 19, 1863, 2.

⁴³⁴ Other prominent constitutional conservatives agreed. Judge William Doer in May warned against resistance that was not “strictly constitutional” and that citizens should look to the courts to determine the questions of constitutionality. If citizen of New York was arrested or imprisoned by military men or provost marshals and the court before whom the question of the citizen’s liberty is brought decides the citizen is entitled to liberty, and if “in spite of this decision force shall be used to detain him,” there should be “no hesitation to support the judiciary in opposition to military usurpation.” “Judge Doer’s Letter,” *Albany Argus*, June 6, 1863.

⁴³⁵ He wrote to Lincoln that, “The harsh measure of raising troops by compulsion [sic] has heretofore been avoided by this Government, and is now resorted to from the belief, on its part, that it is necessary for the support of our arms. I know you will agree with me that justice and prudence alike demand that this lottery for life shall be conducted with the utmost fairness and openness, so that all may know that it is impartial and equal in its operations.”

alluding to the riots, he wrote that the act was a “violation of the supreme Constitutional law” and “the refusal of Governments to give protection excites citizens to disobedience— the successful [sic] execution of the conscription act depends upon the settlement, by judicial tribunals, of its constitutionality.”⁴³⁶ Seymour believed opponents and supporters should be invested in a judicial decision. For proponents, “with such decisions in its favor, it will have a hold upon the public respect and deference which it now lacks.” On the other hand, Seymour argued refusing to test the constitutionality of the act would be regarded as evidence by the people “that it wants legality and binding force.” Because the act was “so unusual in the history of this country” and jarred “so harshly with those ideas of voluntary action,” he urged that it needed sanction from all branches of government.⁴³⁷ Final judicial resolution would, Seymour believed, grant legitimacy in the eyes of the public no matter what the court decided.

Seymour felt that there was nothing to fear if a court deemed the act unconstitutional. He thought following the normal judicial process would “add new vigor” to the government by showing respect for the people's rights and denying the “spirit of lawlessness” embodied by the riots. Additionally, such a decision would not substantially impair Congress’ power to raise armies. If the bill fell, there was “still left the undisputed authority to call forth the armed power of the nation in the manner distinctly set forth in the Constitution of our country.” Seymour remained confident that the constitutional tradition of volunteerism remained sufficient to judiciously fight the war. Not only did constitutional conservatives generally backed Seymour’s strategy, but War Democrats supportive of conscription joined as well. In the aftermath of the

⁴³⁶ “The New York Riots: Letter from Governor Seymour to the President. Mr. Lincoln’s Reply to the Governor,” *New York Herald*, August 10, 1863, 1.

⁴³⁷ *Ibid* Seymour noted that the customary procedures were to “give to our citizens the right to bring all questions affecting personal liberty or compulsory service, in a direct and summary manner, to the Judges and courts of the State or Nation....The right of this Government to enforce military service in any other mode than that pointed out by the Constitution cannot be established by a violent enforcement” but only by the judiciary. *Ibid*.

riots, War Democrat lawyer David Dudley Field wrote to President Lincoln that there was a “very prevalent impression among the persons liable to the draft, that the act is unconstitutional” and that because constitutional conservatives would abide by the decision of the courts, the question should be brought before the courts “at the earliest practicable moment.”⁴³⁸ Field specifically thought the act should be brought before the Circuit Court of New York, believing it would be upheld. New York Mayor George Updyke, joined by *New York Tribune* editor Horace Greeley, *New York Evening Post* editor William Cullen Bryant and ex-Lieutenant Governor Henry Jarvis Raymond, wrote to Lincoln two days later to urge his adoption of the policy recommended by Field to both indicate the authority of the government and to lesson if “not entirely abate the opposition to the conscription.”⁴³⁹ The next day, Republican Massachusetts Governor John Albion Andrew wrote to Edwin Stanton, agreeing that it was “of the highest importance that the principal legal questions which arise under the Conscription act should be brought to a judicial test at the earliest day.”⁴⁴⁰

Some even pressured Seymour to pledge that no man leave the state until the law was tested in the courts.⁴⁴¹ And others appeared to think a test in the courts was imminent, with Democratic Alderman John Hardy claiming he had it on reliable authority that an arrangement existed between federal and state authorities “by which an early decision could be had as to the constitutionality of the Conscription Act.”⁴⁴² Hardy argued the constitutionality of the act could be finally determined easily within a reasonable time by issuing nine writs of *habeas corpus* to

⁴³⁸ David D. Field to Abraham Lincoln, July 19, 1863, *Abraham Lincoln Papers*.

⁴³⁹ George Opdyke et al. to Abraham Lincoln, July 21, 1863, *Abraham Lincoln Papers*.

⁴⁴⁰ John A. Andrew to Edwin M. Stanton, July 22, 1863, *Abraham Lincoln Papers*. Andrew advocated for bringing the test before the Massachusetts Supreme Court, arguing that he did not know any other court before which the questions of act could be “more impartially adjudicated,” as the state court was “as little impressible by outside influences as any tribunal in existence.”

⁴⁴¹ “Radical Intrigue,” *New York Herald*, Aug 8, 1863, 4.

⁴⁴² “The Two Million Five Hundred Thousand Dollar Fund for Conscripts,” *New York Herald*, August 14, 1863, 3. Hardy had studied as an attorney and joined the New York Bar in 1861.

the nine justices of the Supreme Court to obtain a decision within two weeks. He blamed federal authorities, who did not seem “inclined to expedite a decision of this important question,” and claimed this was the reason the city’s Common Council needed to raise funds for volunteers.⁴⁴³

Hardy was not far off. Lincoln and his administration took constitutional arguments seriously but were also unwilling to delay the state drafts in order to seek a judicial resolution at the Supreme Court. Lincoln would not suspend the draft in New York, as Seymour had requested. He wrote that while he did not object to “abide a decision of the United States Supreme Court” or the judges thereof on the constitutionality of the Conscription Act and would be “willing to facilitate” obtaining a decision, he could not “consent to lose the time while it is being obtained.”⁴⁴⁴ Congress had already determined the volunteer system to be inadequate and waiting for a court decision required part of those citizens not in service to “go to the aid of those who are already in it.” Lincoln was pragmatic, aiming to act in “just and constitutional, and yet practical” ways in following his duty to maintain the free principles of the country. Privately sometime after his exchange with Seymour, Lincoln wrote his own opinion upholding the constitution of conscription.⁴⁴⁵

Lincoln answered constitutional conservative critics that the power of Congress to conscript was expressly given and this was the first time a power of Congress was questioned in a case “when the power is given by the Constitution in express terms.” He thought this was the

⁴⁴³ *Ibid.*

⁴⁴⁴ Gideon Welles, *Diary of Gideon Welles, Secretary of Navy Under Lincoln and Johnson*, Volume I (Boston: Houghlin Mufflin, 1911), 395. On August 7th, upon receiving the letter, Gideon Welles recorded that, the letter was a “political document, filled with perverted statements, and apologizing for, and diverting attention from, his mob” and the President’s “manly” and “vigorous” reply showed he would not permit himself to be drawn away on “frivolous and remote issues, which was obviously the intent of Seymour.”

⁴⁴⁵ As noted in the introduction, there are differing accounts of when Lincoln wrote his opinion. If he wrote in August, it would logically follow that he considered after his exchange with Seymour. If he wrote it in November or December after the *Kneedler* decision in Pennsylvania, Lincoln’s August responses would have been helpful to crafting a argument in support of conscription.

first-time powers “plainly and distinctly written down in the Constitution” were denied, as the Constitution clearly gave the power to “raise and support” armies and Congress had exercised that power. This was the “whole of it.”⁴⁴⁶ Like most Republicans, Lincoln felt that the act was clearly constitutional and was only nominally open to Seymour’s judicial solution. In reality, his administration had already shown their strategy of avoiding contrary court decisions, especially in unfriendly state courts. It was a sound, pragmatic strategy, but one that reflected the status of constitutional arguments for Lincoln and his administration. They were to be taken seriously, responded to publicly when necessary, but they were always secondary to supporting the war effort at all costs. This was the crucial difference between constitutional nationalists and constitutional conservatives-the former felt war necessities subsumed constitutional concerns, while the latter were resolute that the war was worth fighting but not at the cost of the Constitution. Despite the administration’s insistence that the act was clearly constitutional and the needs of the war effort were paramount, judicial activity in New York would continue through August and September. Seymour would continue to push for the judicial solution, both with his August 18th proclamation and other public appearances.⁴⁴⁷ It would predominantly focus on the question of whether or not state courts could take challenges to the Conscription Act by writ of *habeas corpus*.

Jordan, Barrett, and Hopson: Second Round of Judicial Battles in New York

In August and September, New York Courts saw three major cases involving the Conscription Act which centered on the question of state court jurisdiction. Despite the push of

⁴⁴⁶ James G. Randall, *Lincoln The President*, (New York: 1945), 298.

⁴⁴⁷ “The Draft in New York: The Firemen and the Draft,” *New York Herald*, August 23, 1863, 4 (appearing before firemen asking whether or not they would be given exceptions from involuntary enlistment, the Chairman spoke for the Governor that he “intimated that it would be impossible for him to make any distinction with reference to the firemen, but that he thought the constitutionality of the question would be tested”)

constitutional conservatives to get a judicial resolution over conscription in New York, they would be bogged down in New York by the jurisdictional battle. Constitutional conservatives lost two out of the three cases and the question remained unresolved at the close of the year, as New York judges continued to clash on the question throughout the 1860s. In the first case *In Re Jordan*, constitutional conservatives lost once again before Judge Smith in Rochester, who declined state court jurisdiction under the rule of *Ableman*.⁴⁴⁸ Three *habeas corpus* petitions were presented to Smith of similar facts complaining that the prisoners were minors under the age of eighteen and that they were being “unlawfully restrained of their liberty by military officers on pretense that they were duly enlisted as soldiers” in service of the United States.⁴⁴⁹ All three petitions and writs were granted but the officers declined to obey the writs and made an amended return claiming to be excused from obeying the writ. Smith’s opinion found that the imprisonment of the minors was *prima facie* lawful. The government argued that *Ableman* meant that once it was established a prisoner was in the custody of the United States under an officer of the United States, state court jurisdiction was at an end.

Smith agreed with the government and denied state court jurisdiction. First, the New York Habeas Corpus Act stated that judges of the Supreme Court and other state judges were authorized to entertain proceedings and inquire into the cause of imprisonment of any person restrained of liberty within the state, but had no discretion in respect to the allowance of such writs if presented in proper form.⁴⁵⁰ New York’s own precedent was mixed on the question of

⁴⁴⁸ Christopher Dell, *Lincoln and the War Democrats: Erosion of Conservative Tradition* (Rutherford: Fairleigh Dickinson University Press, 1975), 250-51; Neely, *Lincoln and the Triumph of the Nation*, 181. Smith was a War Democrat who won re-election to the State Supreme Court bench in the fall of 1863 as a Republican, along with Josiah Sutherland and Henry G. Foster, with the backing of the Union Party.

⁴⁴⁹ “Habeas Corpus-Decision of a State Court,” *New York Daily Tribune*, August 25, 1863. 4.

⁴⁵⁰ *In Re Jordan*, 11 Am. Law Register 748, 750 (N.Y. 1862). (Citing *Passmore Williamson*, 3 Am. Law Register 741 (the Supreme Court of Pennsylvania so held and refused the writ)).

jurisdiction for this class of cases for soldiers held under the authority of the United States.⁴⁵¹

Smith understood it was the duty of state courts to citizens of their state to see to it “when their judicial powers are invoked for that purpose,” that no citizen was unlawfully imprisoned or restrained of his liberty. State judges could not be judicially apprised that a party was in custody under the authority of the United States without a proper return with facts stated or presented to show a case of “apparent lawful detention or imprisonment under the authority of the United States.”⁴⁵² Any person claiming a right to exercise restraint over another must show lawful ground or authority to do so, but Smith believed the government easily met this burden on the basis of enlistment papers and Jordan’s declarations of enlistment at age twenty-one.⁴⁵³

Smith recognized *Ableman*’s binding force, as the doctrine was “essential to the maintenance of the national authority, certainly in a time of war” as no government could “sustain and exercise its power” to their full extent if they could be controlled by the judiciary of another sovereignty or government. Otherwise, every act of the general government which affected the personal liberty of citizens could be overruled upon *habeas corpus* petitions to state courts.⁴⁵⁴ Still, Smith understood that Taney conceded in *Ableman* state judges could issue the writ of *habeas corpus* upon proper application showing illegal restraint and inquire into what authority and cause any party was imprisoned or restrained of his liberty within the state in question. Once the state judge was judicially apprized the party was in the custody of the United States, no state process, including the writ of *habeas corpus*, could “pass over the line of division

⁴⁵¹ *Ibid.*, 755-56. During the War of 1812, Chancellor Kent in *Ferguson* denied the writ in a case of a minor enlistment. Kent argued that the federal Courts had “complete jurisdiction” in such case and any interference would be “exercising power without any jurisdiction.” However, in *Carlton*, which followed several Massachusetts cases, and *Wyngall*, the New York Supreme Court assumed jurisdiction without extensively discussing the question.

⁴⁵² *Ibid.*, 752-53.

⁴⁵³ *Ibid.*, 755.

⁴⁵⁴ *New York Tribune*, August 25, 1863.

between the two sovereignties.”⁴⁵⁵ Courts of the national and state governments could not authorize its courts to exercise judicial power within the jurisdiction of the other sovereignty unless the Constitution granted concurrent jurisdiction.

Smith looked to other state precedent to support his interpretation of *Ableman*. He cited the Michigan Supreme Court’s decision in the *Spangler* case, which also dismissed a writ of *habeas* requested toward a draft commissioner upon the rule of *Ableman v. Booth*. Smith cited *Spangler*’s language arguing that if officers of the general government had prisoners in custody and refused to produce them in obedience to a writ due to orders of United States authorities, state jurisdiction was ousted. Smith agreed and argued that language applied when a New York citizen appealed to a New York court against the authority of the United States under the Conscription Act.⁴⁵⁶ Significantly, Smith also cited Pennsylvania Chief Justice Walter Lowrie on the question of state jurisdiction over *habeas* petitions in his “able opinion” in *Passmore Williamson*.⁴⁵⁷ Smith quotes Lowrie for stating that, “Any man arrested or imprisoned by such warrant, or execution, or sentence from District, Circuit, or Supreme Courts” or from Congress might have relief from “any friendly county Judge wielding the power of *habeas corpus*” and even judges impeached and convicted as traitors might “still have hope from the *habeas corpus*, if a Judge can be found ignorant or insubordinate or degraded enough to declare that his superiors acted without jurisdiction.”⁴⁵⁸ Smith concluded that all federal acts affecting the personal liberty of citizens were thus threatened by writs of *habeas corpus* issued by state courts and this was why *Ableman* was essential to maintaining national authority during the war.

⁴⁵⁵ 11 Am. Law Register, 757.

⁴⁵⁶ *New York Herald*, August 25, 1863.

⁴⁵⁷ For more, see Chapter 5 on Justice Lowrie’s jurisprudence and Chapter 2 on the Fugitive Slave Law constitutional history.

⁴⁵⁸ 11 Am. Law Register, 759.

Otherwise, in localities in which there was notoriety from “some evil-disposed persons in sympathy with the enemies of the country” resisting “by force their arrest and return to the army” and opposed the draft would use state courts to defeat the government’s war effort.⁴⁵⁹

Smith recognized some inconvenience would result from the inability of state courts to grant relief to cases challenging the constitutionality of federal acts through *habeas* writs, especially since there were more state judges and officers to issue writs than United States judges.⁴⁶⁰ However, even if state judges were likely to follow their duty and maintain the Constitution as the supreme law, there was no other course than to dismiss the proceedings. Otherwise, the functionality of the federal government might be impaired. Attacking what he saw as partisanship of those making arguments against the constitutionality of the Conscription Act, Smith imagined some state court judges would issue writs of *habeas corpus* to discharge all persons brought before him on the ground that laws of Congress authorizing the enrollment and “perhaps the war itself” were unconstitutional, thereby giving “color of law to their disloyal acts and proceedings.”⁴⁶¹ As Smith made clear in April, he was unwilling to judicially sanction such action. Like the Lincoln administration, he believed constitutional challenges to conscription threatened the army with depletion by *habeas* writs. Proceedings to reverse any such decisions would be “quite idle and useless” since in the “ordinary course of judicial proceedings several years would elapse” before the case could reach the Supreme Court. Smith’s opinion treated the jurisdictional questions as requiring due consideration, while he quickly dismissed any constitutional arguments against conscription as he had in April.

⁴⁵⁹ *Ibid.*, 760.

⁴⁶⁰ *Ibid.*, 761.

⁴⁶¹ *Ibid.*, 760

Despite Smith's lengthy, passionate consideration of the question, another state supreme court justice disagreed with his conclusion. Just over a week later, First District Judge William H. Leonard on special term before the Supreme Court ruled that state courts could properly issue writs of *habeas corpus* against federal officers.⁴⁶² The case was *In RE Barrett*, involving an alleged deserter whom Colonel Nugent refused to return upon a writ of *habeas corpus*. He felt that the case was not about whether Barrett was a deserter, but whether he ever lawfully became a soldier and whether he was lawfully in the custody of an officer of the federal government. Leonard regarded the jurisdictional question as well-settled by state authority.⁴⁶³ Referring to Smith, he did not "feel the least disposition to criticize the opinion of the learned justice in the fifth district, who seemed anxious to surrender the rights and liberties of our citizens to the exclusive care and protection of the federal judiciary."⁴⁶⁴ Judicial independence was one of the "essential elements far superior to ours." and a judge had "no more right to disclaim a duty which the law devolves upon him than he has to assume a power which is beyond his jurisdiction." Leonard's reading of *Ableman* was that authority of state court to require the production of a prisoner ceases when the commitment has been made by the direction of a judge of the United States courts.⁴⁶⁵ *Ableman* was restricted to the facts of the particular case and did not sweep aside existing state court precedent. Leonard concluded that "every citizen of the state

⁴⁶² Significantly, the battle of state jurisdiction was not over in 1863. According to a later case in 1865, Judge Leonard came "calm and reasonably" to a conclusion directly adverse to that of *In RE Hopson*. Leonard's opinion, according to *Starkweather*, returned to prior New York precedent which Smith misread. As noted, since the decision of the New York Supreme Court in *In Re Carlton* in 1827 by Chief Justice Savage, the practice had been "uniform in this state to allow writs in cases both of sailors and soldiers of the United States, alleged to be illegally detained, until the decision in *In RE Hopson* where the "learned justice in that case seems to deny the authority of the state courts to issue such writ in any such case." *Starkweather* stated that Bacon believed the case to be different, since the party sought to be discharged was arrested and then held in custody as a deserter, which presented a "question quite in advance of a simple inquiry into the validity of a contract of enlistment." "People ex rel. Starkweather, 44 Barb. 98, 106 (N.Y. 1865).

⁴⁶³ *In Re Barrett*, 25 How. Pr. 380, 383. (N.Y. 1863).

⁴⁶⁴ *Ibid.*, 382. (Leonard was referring to *In RE Hopson*)

⁴⁶⁵ *Ibid.*, 382.

is under the protection of the shield of this writ by the constitution of the United States as well as that of the state of New York” since no conflict of jurisdiction “between civil courts of the state and general government arises or can arise on habeas corpus, unless a prisoner has been committed by the direction of a federal judge.”⁴⁶⁶ No process, decree, or judgment had been issued by a federal court to remove the state court’s jurisdiction.

Critics felt Leonard had misunderstand the precedent of *Ableman* and ignored the fact that the Provost Marshal Nugent could not produce the deserter unless he directly disobeyed orders.⁴⁶⁷ The *New York Evening Express* smeared Leonard for issuing an order he knew was “ineffectual” and a mandate he knew could not and would not be obeyed since the “only remaining recourse for the insurrectionary leaders” was a contest in court over jurisdiction to give “disloyal journals” an opportunity for “senseless clamor” over unimportant disputes.⁴⁶⁸ Leonard’s decision could only have been made, according to these critics, in order to embarrass the government as a pretext for a contest between the states and federal government. Leonard, they chastised, had ignored the plain ruling of *Ableman* removing his jurisdiction.⁴⁶⁹ His ruling was also connected to judicial challenges in Pennsylvania, again suggesting he may have opened the door to challenging the Conscription Act’s constitutionality successfully.

Newspaper reports frequently connected the challenge in *Barrett* to the seminal case of *Kneedler v. Lane* in Pennsylvania, where the Pennsylvania Supreme Court was awaiting argument. Correspondence was reported between Barrett’s lawyer, Edwin James, and the “ablest lawyer of the Philadelphia Bar” regarding the *Kneedler* case now before the Supreme Court of

⁴⁶⁶ *Ibid.*

⁴⁶⁷ “Judge Leonard’s Decision,” *New York Daily Tribune*, August 31, 1863, 4.

⁴⁶⁸ “Abolition Ideas of Government,” *New York Evening Express*, August 31, 1863, 2.

⁴⁶⁹ “Judge Leonard’s Decision,” *New York Daily Tribune*, August 31, 1863, 4. (“if he was counsel, he would be seen as the “most unscrupulous lawyer at the bar”).

Pennsylvania on the question of the Conscription Act's constitutionality.⁴⁷⁰ James, in fact, followed the complaint of *Kneedler* to the same effect, filing a complaint and affidavit alleging various grounds of the illegality and unconstitutionality of the act "very specifically and at much length."⁴⁷¹ In the case of *Verren v. Nugent and Manierre*, Edwin James applied to the New York Supreme Court and Justice Leonard for an order upon the Provost Marshal of the Eighth District to show cause why an injunction should not issue restraining them from arresting the plaintiff as a deserter under the Conscription Act. Like the injunction before the Pennsylvania Supreme Court, James' bill was intended to raise the question of the constitutionality of the Conscription Act and ask for a grant of injunctive relief. The *Times* reported that the papers prepared by James contained "various allegations" against the Conscription Act: that it violated the Constitution; that there was no authority in Congress to pass such a law and set forth "at length" the various grounds upon which it would be contended that no citizen could be subjected to compulsory military service, particularly that it deprived the states of their militia force. After argument, Judge Leonard granted an order in *Verren* requiring defendants to appear and show cause why an injunction should *not* be issued yet refused to stay the proceedings upon the ground that the plaintiff, should he be arrested, could apply for a writ of *habeas corpus*. Leonard again appeared to open the door to a successful constitutional challenge to conscription, but ultimately, nothing further happened.⁴⁷²

⁴⁷⁰ "A New Dodge to Thwart the Draft-Edwin James on the Conscription Act-Supreme Court, Before Justice Leonard," *New York Times*, September 4, 1863, 1; "Miscellaneous News," *New York Herald*, September 3, 1863, 2 The case on the behalf of Reverend Doctor Verren contended notice was invalid and Leonard order arguments for cause, meaning the constitutionality of the Conscription Act would be "fully tested."

⁴⁷¹ "The Constitutionality of the Conscription Act: Application for an Injunction to Restrain the Provost Marshal from Arresting an Alleged Deserter," *New York Herald*, September 3, 1863, 10.

⁴⁷² "Law Reports: An Alleged Circulator of 'Treasonable Documents in Limbo. Supreme Court-Chambers,'" *New York Times*, August 30, 1863. Childs was confirmed by Acton to be held by Provost Marshal Nugent as well. This followed reporting from the week before of the case of *People v. Henry C. Childs*, in which Leonard issued a writ of *habeas corpus* to police commissioner T.C. Acton based on a "somewhat lengthy" circulated handbill from the "Sons of Liberty" proposing to test the legality of the Conscription Act.

Between the positions of Smith and Leonard sat Judge William J. Bacon, who found himself flopping between positions on state court jurisdiction. The case of Charles B. Hopson reflects the close battles in New York's courts over conscription, as Bacon initially upheld jurisdiction before changing his mind.⁴⁷³ Bacon was dismissive of constitutional conservative arguments against the constitutionality of national conscription, but receptive to the notion that state courts had a role in *habeas* challenges against federal officers and to the underlying federal acts. Bacon's decision ultimately followed Judge Smith upon rehearing by affirming the applicability of *Ableman v. Booth* and therefore denying the jurisdiction of the state court over *habeas* cases arising under the Conscription Act. The case involved a conscript Hopson held as a deserter under the act by the Provost Marshal whom made a general return. Again, following the war department's orders, the officer declined to produce the prisoner. Bacon presented the case as wholly hinging on the question of whether the state courts could entertain or continue jurisdiction of a case where a person is held under the authority of the United States.⁴⁷⁴ Bacon was aware of the split among state courts concerning the power of state judges to discharge upon a writ of *habeas corpus* persons held by federal officers under the authority of the Conscription Act. Like Smith, Bacon pointed to the *Spangler* case as having denied that power in Michigan, but noted that "very strong and emphatic opinions" had been issued in Pennsylvania, New Jersey and New Hampshire and he presumed "other of the Northern states, upholding the power of the state courts to inquire into detention claimed to be made by the authority of the United States."⁴⁷⁵

⁴⁷³ Mark Neely called this a "self-conscious conflict between judicial duty and national sentiment." Bacon sat in the 5th district and the decision came on September 6th.

⁴⁷⁴ "Law Reports: Habeas Corpus. An Important Decision by Judge Bacon, of Utica," *New York Times*, September 6, 1863. 3.

⁴⁷⁵ In *Re Hopson*, 40 Barb. 34, 46 (N.Y. 1863). Bacon recognized that New Jersey's courts had disagreement over the issue as well, but suggested that the most recent case of *State v. Zucker* showed a "clear and precise authority" for the grounds maintained in Bacon's opinion.

In September 1863, state court jurisdiction to issue writs of *habeas corpus* against federal officer and challenge underlying federal acts like the Conscription Act remained an open question.

Referencing the antebellum jurisprudence surrounding the Fugitive Slave Law, Bacon noted that in some of the “extreme southern states the power to interfere with the action of the United States” had been repeatedly disclaimed while in northern States, like Pennsylvania and Massachusetts, it had been “strongly maintained.”⁴⁷⁶ The New York Supreme Court could look to their own precedent. Chief Justice James Kent made an “elaborate and able argument” in *the Matter of Ferguson* which wholly denied the jurisdiction of the state court to entertain the *habeas* application. The case came out of enlistment “under color of authority of the United States” and by an officer thereof, such that federal courts had complete and “perfect” jurisdiction. Kent wrote there was no need for the state courts to hold concurrent jurisdiction, as the federal judicial power was “commensurate with every case arising under the laws of the union.”⁴⁷⁷ Combined with *Ableman*, Bacon felt state courts lacked concurrent jurisdiction. *Ableman* was “entirely decisive” on the question.⁴⁷⁸ Strikingly, Bacon admitted to having his mind over the course of the case and misunderstanding the meaning of *Ableman* upon the initial hearing in the case because most precedent favored state court jurisdiction.⁴⁷⁹ Initially, Bacon believed an application for a writ of *habeas corpus* and the directing the provost marshal to the court to justify depriving a citizen of liberty was merely ministerial, in standing with long-held New York precedent. By *Ableman*’s rule, Hopson’s arrest was “under and by virtue of the

⁴⁷⁶ *Ibid.*, 43-44. Going back to one 1807 Georgia case for two seamen arrested for desertion by a justice of the peace) Bacon argued these all stemmed from the inimitable Chief Justice Shaw’s opinion in *In Re Sims* upon a *habeas corpus* claim inquiring into the constitutionality of the Fugitive Slave Law of 1850. Shaw argued the court should in “no case issue a writ of *habeas corpus*” to bring in a party held under United States process except in a “clear case” where it was “necessary to the security of personal liberty from illegal restraint.” *Ibid.*, 47. (citing *Thomas Sim’s Case*, 7 Cush. 285 (Mass. 1851)).

⁴⁷⁷ *Ibid.*, 48-49; *In the Matter of Ferguson*, 9 Johns R. 239 (N.Y. Sup. Ct. 1812).

⁴⁷⁸ *In Re Hopson*, 40 Barb. 56-57.

⁴⁷⁹ *Ibid.*, 55.

authority of the United States” for an alleged offense against the government and thus any state tribunals were ousted.

Like Smith, Bacon also used the case as an opportunity to disclaim arguments against the Conscription Act. He argued questions of the constitutionality of federal law should belong specially and exclusively to the federal courts. State courts, when presented with such questions, should remit them to federal courts. Bacon knew it was “inevitable that such questions” would at least collaterally and incidentally arise in state courts and in some cases, “the constitutional question” was “paramount.” However, outside of “Justinians” with no authority, “no respectable counsel” would argue that under a Constitution granting power to “raise and support armies” to Congress would not give the “necessary and incidental power” to maintain discipline by dealing with desertion in the most “effective and summary way.”⁴⁸⁰ While no question was before him regarding the validity of the Conscription Act, Bacon was aware of the “argument most in vogue in these days is that which professes to deal with the constitutional power to enact laws unwelcome in certain quarters” for being “offensive to the sensibilities” or in contrast with the “supposed interest or convenience of individuals.” Bacon’s denial of constitutional conservative arguments was an indirect assault, but it was clear he thought the act constitutional.

In concluding his opinion, Bacon noted that he changed his mind upon return of the writ and the second argument on the question of jurisdiction. The discussion, “protracted” and “tedious,” had persuaded him to reach a conclusion the opposition of his first impression as the result of “sober second thought” and “full and elaborate argument.” Bacon anticipated the responses of constitutional conservative critics that he was “too ready to sacrifice state dignity and judicial independence at the shrine of a grasping national supremacy that sought to override

⁴⁸⁰ *Ibid.*, 48.

the authority of state tribunals” and break down all protection of individual freedom upon the “shattered fragments of state sovereignty” by founding a “great central despotism” with the cherished rights and liberties of Americans in “imminent jeopardy” from the growing and continually encroaching national power.⁴⁸¹ The constitutional arguments of constitutional conservatives were the views of many sincere, honest, patriotic and loyal men, but Bacon could not adopt their fears or apprehensions. Bacon claimed he was sensitive to the importance of maintaining the just authority of the state and its tribunals, but he did not see the same danger in upholding the general government's power. The perils of the war arose from “unduly magnifying state authority” and “countenancing, if not directly permitting, state interposition in matters committed by the constitution to the sovereign power.”⁴⁸² It was understood that Bacon’s opinion both sustained *Ableman*’s rule and the constitutionality of the Conscription Act.⁴⁸³ It was thus a major loss for constitutional conservatives. Although the battle over state jurisdiction continued, challenges to conscription in New York were at an end.

Combined, the three decisions of Smith, Leonard, and Bacon show how New York courts remained split on the question. The courtroom battles in New York in 1863 resulted in stalemate. The reporter for the New York Supreme Court seemed to suggest that Bacon’s ultimate refusal of state jurisdiction was supported by his colleagues and the United States District Court for the Southern District of New York even though Judge Mullen, of the same judicial district, had issued a decision “taking contrary grounds.”⁴⁸⁴ Around the same time, Judge White of the

⁴⁸¹ *Ibid.*, 60.

⁴⁸² *Ibid.*

⁴⁸³ “Habeas Corpus-Another State Court Decision,” *New York Daily Tribune*, August 31, 1863. 4. (“Insurrectionary journals” could “quibble and misstate” in vain *Ableman*’s holding to conceal from their readers and act as if a “disloyal judge might disregard this masterly decision,” but for the “rest of the world Judge Bacon’s opinion” was final in judicially affirming the enforcement of the Conscription Act.)

⁴⁸⁴ *Washington Evening Star*, August 29, 1863, 2.

Superior Court also found state court jurisdiction lacking in *In Re Michael Cox*. The *Times* reported that White went against the usurpation of McCunn on the same court and cleared the fog around Judge Leonard's incorrect statement of law. White too found state courts had no right to control the actions of federal officers in the exercise of the functions of his office, as the military power of the Union was vested exclusively in the United States and questions as to the alleged violation by the prisoner of the rules provided by Congress for the government of the military are questions arising under the laws of the United States. Thus, there could not be a concurrent jurisdiction of the state and federal tribunals over them.⁴⁸⁵ Additionally, a *certiorari* was issued out asking for a reversal of Bacon's decision in *Hopson*. On October 6, Roscoe Conkling, counsel for the provost marshal, argued against a reversal based on President Lincoln's suspension of the writ of *habeas corpus*. Conkling argued this made it improper for the court to entertain the case further. After hearing arguments, a majority of judges "could not agree that the proclamation did not prevent any further action in the case," and thus declined to hear arguments on the merits.⁴⁸⁶ Challenges to conscription by constitutional conservatives ultimately ended once the New York Supreme Court affirmed state courts could not entertain such cases.

Unlike Pennsylvania, New York did not have a single case at its highest court which decided the constitutionality of the Conscription Act for the whole state. Still, New York courts saw important activity throughout 1863, speaking to the role of state courts in answering core constitutional questions. Several New York judges upheld state court jurisdiction to grant writs of *habeas corpus* to inquire into the constitutionality of federal law used to hold citizens. This

⁴⁸⁵ "Judge White's Habeas Corpus Decision," *New York Times*, September 20, 1863, 4 (citing Justice Nelson's 1851 jury charge concerning the Fugitive Slave Act, arguing that, "The right of the State authorities to inquire into such restraints is not doubted....All that is claimed or contended for is, that when it is shown that the commitment or detainer is under the Constitution or a law of the United States, or a treaty, the power of the State authority is void, and any further proceedings under the writ is coram non justice and void.").

⁴⁸⁶ *Ibid.*, 64.

allowed city Judge McGunn in July 1863 to declare the Conscription Act unconstitutional and to act under writs of *habeas corpus* to release prisoners until the state supreme court overruled his jurisdiction. Even for judges like Bacon who ultimately found state court jurisdiction lacking, the internal constitutional debate was vigorous. As the *Daily Tribune* wrote, Bacon's opinion deciding against state jurisdiction was of "special value" precisely because it was arrived at in "opposition to his first impressions, upon argument and examination."⁴⁸⁷ State court judges were left to balance between the role of state courts in a federalist system to protect their citizens and sovereignty against the needs of the national government to protect its existence in the face of insurrection. Questions of jurisdiction were ultimately related to the greater concerns of constitutional conservatives over the threat of conscription to federalism.

New York judges engaged in constitutional battles alongside the ongoing public constitutional debate. Both Governor Seymour and President Lincoln signaled the importance of court decisions. Seymour wished to see conscription peacefully struck down as unconstitutional by state tribunals and to see the result upheld by a friendly Supreme Court, while Lincoln wished to continue to operate the draft and avoid any problematic judicial results. The stakes were ultimately higher in Pennsylvania, where the constitutional battles answered the constitutionality of conscription and largely bypassed the jurisdictional issue. This happened both because Pennsylvania saw action at the federal district court level where jurisdiction was no issue and because the Philadelphia lawyers behind the *Kneedler* case found a way around the jurisdictional problem—filing their case in equity. Constitutional conservatives won some minor victories in New York but lost the battle over the constitutionality of conscription even if the question of jurisdiction ended in stalemate. In Pennsylvania, they would win the greatest victory and for a

⁴⁸⁷ "Habeas Corpus," *New York Daily Tribune*, August 25, 1863, 4.

brief moment, it would appear possible the question would finally reach the Supreme Court and the act might well be deemed unconstitutional.

CHAPTER IV: CONFLICT AND CONSTITUTIONALISM IN THE KEYSTONE STATE

On September 14, 1863, Attorney General Edward Bates wrote in his diary that President Lincoln had called a special cabinet meeting and was “more angry than [he had] ever [seen] him.”⁴⁸⁸ What had so raised the furor of the President? Pennsylvania courts were apparently discharging “drafted men rapidly under *habeas corpus*” to defeat the draft.⁴⁸⁹ Days earlier, Secretary of War Edwin Stanton remarked to Lincoln that there was “evident design” on the part of some judges in various states, including Pennsylvania, to exercise their “powers in hostility to the general government” in its war effort and “especially with the view to prevent the operation of the draft and encouraging desertion.”⁴⁹⁰ Secretary of Navy Gideon Welles noted that Lincoln was “determined to put a stop” to these “factious and mischievous proceedings” if possible.⁴⁹¹ Various opinions were given at the beginning of the meeting, but Lincoln felt the Pennsylvania courts were enacting a plan “of the democratic copperheads, deliberately acted out to defeat the government, and aid the enemy.”⁴⁹² “[N]o honest man” could *or did* believe that state judges had any such power to release men under *habeas corpus*.⁴⁹³

⁴⁸⁸ Edward Bates, *Diary of Edward Bates*, Ed. Howard K. Beale (Washington D.C.: Government Press, 1933), 306.

⁴⁸⁹ Gideon Welles, *Diary of Gideon Welles: Secretary under Lincoln and Johnson* (Boston, MA: Houghton Mifflin, 1911), 432.

⁴⁹⁰ George G.C. Gorham, *Life and Public Services of Edwin M. Stanton, Volume II* (New York: Houghton, Mifflin & Co., 1899), 115. Stanton wrote to Lincoln that he had read Provost Marshal Fry’s letter asking for instructions in regard to the proceedings by state courts in Pennsylvania in the “discharge of deserters and the exercise of jurisdiction over persons held in military custody.

⁴⁹¹ *Ibid.*

⁴⁹² Bates, *Diary of Edward Bates*, 306.

⁴⁹³ *Ibid.* (emphasis added).

Some cabinet members, including Postmaster General Montgomery Blair, desired a judicial solution and felt that a case could be made before a federal judge so that they would have legal judgment on their side.⁴⁹⁴ Secretary of Treasury Salmon P. Chase was the dissenting voice, calling the writ of *habeas corpus* the “most important safeguard of liberty” and noting that it was generally conceded state courts could issue writs for persons detained as enlisted soldiers and discharge them.⁴⁹⁵ Blair and Secretary of the Interior John Palmer Usher concurred, with Blair stating he had often granting such writs as a judge in Missouri. Still, Chase conceded that the writ could be abused for the criminal purpose of breaking up the army. Bates objected that no judicial officer could take from presidential control *any* prisoner by *habeas corpus* and suggested the administration act defensively by refusing to present the body to state judges and federal judges who issued writs of *habeas corpus*.⁴⁹⁶ Stanton encouraged Lincoln to suspend *habeas corpus* given the interference of state courts and judges which felt “called upon to determine the constitutionality of the war measures of the general government.”⁴⁹⁷ Because Pennsylvania’s federal courts had released more prisoners than the state courts, Lincoln edited the order to address all courts. The next day, Lincoln decided both to issue a proclamation suspending the writ of *habeas corpus* and an order to refuse obedience to any writs issue by state or federal courts with indemnification for

⁴⁹⁴ *Ibid.*

⁴⁹⁵ David Donald, ed., *Inside Lincoln’s Cabinet: The Civil War Diaries of Salmon P. Chase* (New York: Longmans, Green & Co., 1954), 193-94.

⁴⁹⁶ Bates, *Diary of Edward Bates*, 306. (emphasis added). Provost Marshal Fry pursued the same strategy in New York city over the summer. This was a reversal of Bates own policy. Earlier in the war, Bates issue an opinion to the Pennsylvania District Attorney to honor *habeas* applications for discharged enlisted minors in state courts. It was “not the official duty” to resist state court applications. The Secretary of War should order the District Attorney to attend the hearing and dispute the discharge. 10 Op. Att’y Gen. 146 (1861)

⁴⁹⁷ Mark Neely suggests that Lincoln, like Welles, only knew the “practical necessity of forbidding such interference” of state courts with mobilization in the war and that “had he known his law better,” Lincoln may have responded to the state court precedents cited by Chase with *Ableman*. Neely appears to imply that Lincoln was unaware of *Ableman*. See Neely, *Fate of Liberty*, 71.

the officers involved.⁴⁹⁸ In the middle of the bloody Civil War, Lincoln and his administration had picked a fight with the Pennsylvania judiciary.

Generally, the Lincoln Administration's strategy was one of avoidance. The Lincoln administration desperately wished to dodge cases that might threaten their war policies. State court or lower federal court cases decided against them could be appealed to an unfriendly Supreme Court. In their eyes, both Pennsylvania state and federal courts gave them legal setbacks that might impinge on the war effort. In Pennsylvania's federal courts, the ire was directed at both the succession of writs of *habeas corpus* granted to release soldiers, as at least 40 soldiers were released by Judge John Cadwalader of the Eastern District and Judge McCandless of the Western District, and the federal district court cases of *Antrim* and *Stingle*. In those two cases, Judge Cadwalader addressed the constitutionality of both the Conscription Act and decisions of the Boards of Enrollment, deciding in favor of the constitutionality of the underlying act but upholding judicial review for federal courts over decisions of the boards.⁴⁹⁹ Still, when Lincoln issued his order, Pennsylvania's Supreme Court had yet to issue its most monumental ruling that could do far more to inhibit Lincoln's war measures.

In November 1863, the Pennsylvania Supreme Court gave constitutional conservatives their most important victory by finding conscription unconstitutional in *Kneedler v. Lane*.⁵⁰⁰ In so doing, three judges on the Pennsylvania Supreme Court paralleled the core argument of constitutional conservatives that the Conscription Act violated the Constitution's structure of

⁴⁹⁸ Bates, *Diary of Edward Bates*, 307.

⁴⁹⁹ *Antrim's Case*, 1 F. Cas. 1062 (E.D. Pa. 1863); *Stingle's Case*, 23 F. Cas. 107 (E.D. Pa. 1863). The Federal Archives in Philadelphia show that indeed both Cadwalader and McCandless saw an influx of *habeas* cases in August and early September. McCandless saw 24 cases in that period before Lincoln's September 15th proclamation. Cadwalader saw 16 cases, signing at least six writs for release from federal custody. Most of these were minors cases, but both saw several cases under other causes, mostly from citizens drafted under the wrong name. National Archives at Philadelphia, Record Group 33.

⁵⁰⁰ *Kneedler v. Lane*, 45 Pa. 238 (1863).

federalism. In the months between the passage of the Conscription Act in March and November, Pennsylvania courts litigated and confronted both procedural questions regarding state court *habeas* jurisdiction as well as the ultimate question of the constitutionality of conscription. In that time, federal district court Judge John Cadwalader played the most significant role in deciding two key cases which granted the government limited, narrow victories.

The Debate in the Pennsylvania Press

After the passage of the Conscription Act in March, public debate over the act began immediately both in the press and political speeches and actions. In Pennsylvania newspapers, constitutional conservative editors sparked a public constitutional debate focused on attacking the Conscription Act for unconstitutionally destroying the structure of antebellum federalism. The public constitutional debates occurred in three phases in 1863, with the first occurring during and just after the passage of the Conscription Act, the second coming in the wake of the New York City draft riots, and third following the *Kneedler* decision. Constitutional conservatives did not wait for debate in Congress to end to mount their critical attacks. During the Congressional debate in February, the *Reading Gazette and Democrat* noted that the bill conferred “new and extraordinary powers” upon the President, established martial law over the whole union, and overrode constitutional and statutory authority of state governments over their citizens with respect to military service.⁵⁰¹ Days before the passage of the Conscription Act, A.V. Larrimir warned that the Conscription Act ignored the framers of the Constitution who had “wisely provided against such despotism” through separation of powers and constructed a government that did not accept centralization of power without any limits.⁵⁰² Similarly, the

⁵⁰¹ “The Conscription Bill,” *Reading Gazette and Democrat*, February 21, 1863, 2.

⁵⁰² “Speech of Hon. A.V. Larrimer, before the Council Bluffs, Democratic Association, February 28, 1863,” *Democratic Watchman*, April 3, 1863, 1.

Harrisburg *Patriot & Union* argued the exclusively federal act would place the “whole control” of male citizens twenty to forty-five in the hands of the President.⁵⁰³ Before the act was passed, constitutional conservatives in Pennsylvania were echoing the same concerns of their congressional representatives over the threat to antebellum federalism.

The passage of the Conscription Act only intensified the public constitutional debate. The day after the act’s passage, the Clearfield *Democratic Banner* gave its readers the “range of arguments” against it, with the foremost argument being that it set a “dangerous precedent of overarching federal authority” and as “unconstitutional and revolutionary” as an act of Congress could be.⁵⁰⁴ Hence, the *Democratic Banner* argued that the draft amounted to the “annihilation of state sovereignty” by treating the country as one consolidated nation under a single, centralized government and military jurisdiction like the dictatorships of Europe.⁵⁰⁵ The Reading *Gazette and Democrat* similarly complained that the Conscription Act imperiled federalism by placing the militia force under the “complete control” of the President without “any intervention whatever” on the part of state authorities. Combined with the Indemnity Bill and the Banking Bill, Congress had given the President and the executive branch “absolute and unlimited power” over the purse and sword of the nation.⁵⁰⁶ James F. Campbell’s *Johnstown Democrat* agreed that the act gave the President power to conscript “whenever, wherever, and almost whoever he may please.” They blamed abolitionist lawmakers for bringing European despotism to America with

⁵⁰³ “Prepare the Conscription,” *Harrisburg Patriot & Union*, March 2, 1863, 2.

⁵⁰⁴ “Passage of the Conscription Bill and the Annihilation of State Sovereignty,” *Democratic Banner*, March 4, 1863, 2.

⁵⁰⁵ *Ibid.* The *Banner* later attacked the act for “harm to every vestige of state sovereignty” and following Jefferson Davis and the Confederacy in moving from a republic to a military despotism as if “they had burnt the Constitution” and made Lincoln king. “A Debatable Question,” *Democratic Banner*, March 11, 1863, 2. Levi L. Tate’s *Columbia Democrat* agreed that, “No clause in the Constitution gives even a semblance of power to make such an enactment” since state militia were distinctly recognized while the law effectively created “a forced standing army” which “totally destroys the militia of the states.” “Wisdom and Philosophy,” *Columbia Democrat*, April 4, 1863, 2.

⁵⁰⁶ “Adjournment of Congress,” *Reading Gazette and Democrat*, March 7, 1863, 2.

the “odious and serf-like term ‘conscript’ and the “pressgang” of the “enrolling board” forcing citizens to serve.”⁵⁰⁷

Given the extent of the threat to antebellum federalism, constitutional conservatives, as they did in New York, looked to the judiciary for redress. Levi Tate, editor of the *Columbia Democrat*, foresaw three options to deal with the law: to submit, to resist by force, or to appeal to the courts of law.⁵⁰⁸ The best option was appeal to the Supreme Court of Pennsylvania, who would not hesitate to “vindicate the Constitution,” with a decision the legislature, people, and President would have to abide by. Thus, some Democratic newspapers in Pennsylvania agreed with Horatio Seymour’s emphasis on a judicial solution to the constitutionality of conscription.

Although they were primarily concerned with threats to antebellum federalism, constitutional conservatives also attacked the Conscription Act for infringing upon civil liberties. As they argued in Congress, threats to civil liberties were treated as secondary, stemming from the greater risk to antebellum federalism. Consolidated government under a strengthened President necessarily took power from the states who could no longer protect their citizens from the harm of arbitrary actions by federal officers. One Philadelphia reader wrote into the *Inquirer* that the Conscription Act declared that “our liberties are gone,” as the unconstitutional legislation established a dictatorship with an “amplitude of powers in the hands of the so-called President.”⁵⁰⁹ Likewise, the *Indiana Democrat* declared that the “Rich Man’s Law” worked to create a “radical change in the military system” and was a “long stride towards a consolidated

⁵⁰⁷ “The Conscription Bill,” *Johnstown Democrat*, March 4, 1863, 2.

⁵⁰⁸ “Wisdom and Philosophy,” *Columbia Democrat*, April 4, 1863, 2. Additionally, the provost marshal was “wholly incompatible with free government” and an “exaggerated copy” of the military despotism of Russia and France.

⁵⁰⁹ *Philadelphia Inquirer*, March 6, 1863. The “sweeping law of conscription” placed “every man capable of arms-bearing subject to Lincoln’s call” while the President and his subordinates were indemnified for any past and future invasion of liberty, a “new and terrible application of the maxim that ‘the King can do no wrong.’”

government” in which the states were no longer “permitted to settle the manner, terms and extent of a conscription.”⁵¹⁰ Like constitutional conservatives in Congress and New York, complaints about inequality and arbitrary power in the law were still linked to the larger peril facing antebellum federalism.

Pro-administration and constitutional nationalist editors in Pennsylvania entered this public constitutional debate over conscription with their own certainty that the act was constitutional and necessary. Robert G. Harper’s *Adams Sentinel* saw the speech of New York War Democrat John Van Buren as emblematic of constitutional nationalist responses.⁵¹¹ Van Buren saw constitutional conservatives as against “further prosecution of the war” and wrong about their interpretation of constitutional traditions.⁵¹² Van Buren noted the state of New York had precedent for conscription, a law passed during the War of 1812 he deemed “more stringent” than the Conscription Act. The Philadelphia *Inquirer* agreed that since 1792, it had always been the law that “a drafted man who would not perform military service in time of war” could escape by payment of money. They asked if the lawyers who “so vehemently denounce the authorities” would say the same things of Jackson, Madison, Jefferson and Washington.⁵¹³ Republicans also countered class arguments, as the *Village Record* commented the “tory” allegations that the army would only draft poor mean was false since the draft was most beneficial to the poor because the price of a substitute was only \$300.⁵¹⁴ Republican papers were thus willing to suggest that

⁵¹⁰ “The Conscript Law a Rich Man’s Law,” *Indiana Democrat*, March 12, 1863, 2.

⁵¹¹ Van Buren was a lawyer, a member of the New York State Assembly, and later, Governor Seymour’s Paymaster General for the state militia. “Obituary: John D. Van Buren,” *New York Times*, Dec. 2, 1885.

⁵¹² “War Meetings: Another Speech of John Van Buren,” *Adams Sentinel*, March 24, 1863, 2-3; Andrews, J. C. 1942. “The Pennsylvania Press during the Civil War.” *Pennsylvania History: A Journal of Mid-Atlantic Studies* 9 (1): 22-36. 27.

⁵¹³ “The Conscription Act and the Putative Leaders of the Democracy,” *Philadelphia Inquirer*, March 28, 1863.

⁵¹⁴ “Only Poor Men to Be Drafted,” *Waynesboro Village Record*, March 27, 1863, 2. The use of “tory” was clearly meant to signify disloyalty and treat constitutional arguments as the mark of disloyal opposition. “Copperheads and Future History,” *Waynesboro Village Record*, April 24, 1863, 1.

denying the constitutional authority for conscription was tantamount to disloyalty. Thus, the Pennsylvania Republican connected Pennsylvania Democrats to radical New York Democrats like Fernando Wood. In late March 1863, the *Inquirer* wrote that the “crafty and unscrupulous” Wood along with the “well read and well bred” William B. Reed were taking the city down to the “shallowest and noisiest” with their fierce condemnation of the Conscription Act.

After April, the press debate briefly died down, but was soon resurrected by two events—the beginning of the draft operations within individual states in July and the subsequent New York City draft riots. In the aftermath of the draft riots, Republican newspapers blamed constitutional opposition as having fanned the flames of violence resistance. As the *Harrisburg Evening Telegraph* wrote on July 15, Democrats like Judge Woodward and Fernando Wood had urged the people to resist the Conscription Act and in New York, the people had obeyed their suggestions and resisted the laws.⁵¹⁵ Democrats felt that the cause of the riots was readily apparent—it was the act itself. One Pennsylvania Democratic paper reacted to the “terrible and sanguinary riots” by arguing that the immediate cause was “the enforcement of the infamous Conscription Act, which aside from its unconstitutionality, contains many obnoxious features.”⁵¹⁶ It was clear from the beginning to Democrats that the Conscription Bill would provoke civil disorder. Pointing to the decision of Judge McCunn, the *Johnstown Democrat* stated that the Conscription Act had already been pronounced unconstitutional in the city and it was questionable whether the act could be enforced, “at least in that state.” They recommended to the people of Pennsylvania to avoid this “baleful example” of violence by looking to the courts as the legitimate means to set aside this unconstitutional law.⁵¹⁷ Meanwhile, the

⁵¹⁵ “The Practical Results of Modern Democratic Teaching,” *Harrisburg Evening Telegraph*, July 16, 1863, 2.

⁵¹⁶ “The Draft Riot in New York: The Causes,” *Johnstown Democrat*, July 22, 1863, 2.

⁵¹⁷ “Responsibility for the New York Riots,” *Johnstown Democrat*, July 29, 1863, 2.

Republican press starkly opposed the testing of the act in the wake of the draft riots. Hearing that New York Democrats proposed to act upon the suggestion of War Democrat James T. Brady to test the constitutionality of the Conscription Act, the *Philadelphia Press* wrote that no court of law “at a time like this” should permit such a question to be raised since “no loyal and law-maintaining judge” could sanction it.⁵¹⁸

In the weeks following the riots, the *Johnstown Democrat* revisited the primary constitutional arguments against conscription, keeping the focus on protecting antebellum federalism.⁵¹⁹ They maintained that the Constitution never gave Congress power to interfere with the right of states to organize, arm, and discipline their own militias, as protected by the Tenth Amendment. Article I only granted Congress the “right to provide how they should be organized, armed, and disciplined.” Further, Congress and the President only held constitutional power over the militia when in actual service of the United States. The act was unconstitutional in that it took away the power of states to appoint its own officers over its own militia and granting it to the President. As constitutional conservatives consistently argued, the reserved powers of the states included the appointment of officers in their own militias and to have each militia unit commanded by a state officer. The framers foresaw that Presidents might be tempted to exceed their authority and therefore limited the powers of the President to his duties as set forth in the

⁵¹⁸ “Testing the Conscription,” *Philadelphia Press*, July 25, 1863, 2. Brady was a well-respected New York attorney who would later represent Jefferson Davis at his treason trial in 1866 alongside Pennsylvania Democrat William B. Reed. “The Trial of Davis,” *Mariettian*, April 28, 1866, 2.

⁵¹⁹ “The Conscription Act: Its Unconstitutionality Demonstrated Beyond Cavil. Authorities Quoted,” *Johnstown Democrat*, August 5, 1863, 2. The *Harrisburg Patriot and Union* printed a largely similar article in September, writing it was apparent “that the Constitution employs two terms in providing for the general defense and they do not refer to the same thing.” Instead, the army is a body that belongs exclusively to the United States and in contrast, the militia is a body that belongs exclusively to the states, meaning that Congress raises and supports the “army,” not militias. They also constituted separate legal concepts in that army duty is formed by contract on the basis of pay, whereas militia service is formed on the basis of a civic duty. *Harrisburg Patriot and Union*, September 1, 1863, 1 (emphasis added); see also *Harrisburg Patriot and Union*, September 1, 1863, at 1 (observing that the difficulty with the Conscription bill is that it ignores the existence of the states by striking down the militia which the Constitution says is “necessary to the security of a free State” under the Second Amendment).

Constitution. The *Johnstown Democrat* continued with other familiar complaints over the act's division of the country into military districts and appoint provost marshals with unlimited power over citizens. The *Johnstown Democrat* did not believe that any "sane man" could understand the framers of the Constitution as having granted the President such unlimited and "despotic power."⁵²⁰ That power would override state authorities including the state courts and threaten the states with martial law, thus further impairing federalism.

Republican newspaper responses remained short and pointed. The *Philadelphia Press* looked to counter the claims that the English never resorted to conscription, pointing to the English history of impressment. Impressment was the arbitrary and capricious seizure of individuals from the general body of citizens, while conscription was more like a general tax, a service required of every subject.⁵²¹ The *Press* also quoted the *London Journal* for saying that it would be the "very imbecility of weakness to pretend" the exemption from forced service would extend to emergencies like the Civil War, as the English had frequently relied on the "severest conscription" on the sea while avoiding the need to use conscription for the army.

Other constitutional nationalist commentators continued to suggest that constitutional arguments against conscription were signs of disloyalty that were absurd and factious. One War Democrat pamphlet argued Democrats should not hear the "disloyal lips" of those like Governor Seymour and Vallandigham.⁵²² The pamphlet reminded readers that during the War of 1812, Federalists lobbied against conscription, impairing every attempt to carry the power into operation, with men of high standing objecting on the "absurd, untenable ground of the measure

⁵²⁰"The Conscription Act: Its Unconstitutionality Demonstrated Beyond Cavil. Authorities Quoted," *Johnstown Democrat*, August 5, 1863, 2.

⁵²¹ "Conscription from an English Point of View," *Philadelphia Press*, September 4, 1863, 2.

⁵²² "War Democrat," *The Boot on the Other Leg or Loyalty Above Party* (Philadelphia, 1863) (Harvard College Library) He added that if the loyal Democrats of 1814 were "positively right," the disloyal Democrats of 1863 were "superlatively wrong."

being ‘*unconstitutional*.’”⁵²³ He decried too the “hideous outcry” and “miserable rants” raised in and outside of Congress in February 1863 which used the “odious name” conscription in order to attach it to the tyrannical French system. Thus, constitutional nationalists saw opponents of conscription as cynically playing upon the public’s gullibility by claiming the Conscription Act was “wholly unprecedented” and “utterly unconstitutional.”

The second press debate in July and August was an opportunity for constitutional conservative editors to remind their readers of the strongest arguments against the constitutionality of conscription. They again focused on the threats to federalism and the lack of fidelity to constitutional tradition. This set the stage for what would come at the end of July, as Philadelphia lawyers filed their strongest challenge to the Conscription Act in *Kneedler v. Lane*. One final round of constitutional debate would come in November after *Kneedler*, as both sides remained convinced of the veracity of their constitutional arguments.

The June Democratic Convention

The public constitutional debate included not just newspaper columns, but political speeches and actions of elite citizens closely followed in the partisan press. The most widely covered event at which constitutional conservatives could reach a statewide audience outside of Congress was the June Democratic State Convention in Harrisburg. When the convention assembled to nominate their candidates for the 1863 state elections, they endorsed resolutions speaking to their constitutional commitments. The resolutions spoke to renewing the “fidelity to the Constitution,” which provided “to every citizen that of being secured in his life, liberty, and property, so that he cannot be deprived of either without a due form of law.”⁵²⁴ Another key resolution, sounding close to endorsing nullification, spoke to the “plain duty” of state

⁵²³ *Ibid.*, 9-10 (emphasis in original).

⁵²⁴ “Democratic State Convention,” *Philadelphia Inquirer*, June 19, 1863.

magistrates to “use whatever power of the law” to “protect the state and the people from lawless outrages” so that the people would not hold their liberties at the “mere will of the federal executive.” The duty of the state courts was to protect its citizenry from any unconstitutional federal actions. Once the convention passed resolutions, they moved onto the central business at hand--finding a candidate for governor who would repel “all aggressions of federal authority” upon reserved state rights in order to be in “strict harmony” with the Constitution.⁵²⁵ It was only after a spirited contest between several prominent candidates that Judge George Woodward won the nomination.

In the ensuing struggle over the nominee, War Democrats favored former Congressman William H. Witte and the Peace Democrats favored State Senator Heister Clymer. Woodward was the compromise candidate as a constitutional conservative and the platform put forth supported the war but denounced conscription.⁵²⁶ Indeed, a total of nine ballots were counted, which Woodward consistently trailing Witte, Clymer and others before the final ballot gave Woodward 75 votes to Clymer’s 53.⁵²⁷ Speaking after the nomination, Witte praised Woodward’s character as being so high it was “scarcely be just to praise him, since that might imply that commendation was necessary” and that as governor, “no kidnapping” would occur

⁵²⁵ “The Democratic Press of the State on the Nominations,” *Harrisburg Daily Patriot and Union*, June 23, 1863, 1; “The State Convention,” *Harrisburg Daily Patriot and Union*, June 3, 1863, 1.

⁵²⁶ Christopher Dell, *Lincoln and the War Democrats, the Grand Erosion of Conservative Tradition*, (London: Associated University Press, 1975), 246 Woodward received the nominee once Democratic State Central Committee Chairman Francis W. Hughes was authorized to withdraw Witte’s name, possibly due to the concession of Witte himself; Sean Nalty, “Come Weal, Come Woo, I am with the Antislavery Party: Federalism and the Formation of the Pennsylvania Union Party in 1860-1864,” in *A Political Nation: New Directions in Mid-Nineteenth Century Political History*, ed. Gary W. Gallagher & Rachel Sheldon (Charlottesville: University of Virginia Press, 2012), 151-152 Nalty notes that Woodward’s “impeccable conservative credentials” could attract both “errant Democrats” in the Union party and ex-Whigs who supported the Constitutional Union Party in 1860 and gave hope to Democrats that they could improve upon their 1862 electoral victories by breaking up the 1862 Union coalition.

⁵²⁷ “The State Democratic Convention,” *Presbyterian Banner*, June 24, 1863, 3; “Balloting for Governor-Judge Woodward Nominated,” *Philadelphia Press*, June 18, 1863, 2; “The Nominees of the Democratic Convention,” *Harrisburg Daily Patriot and Union*, July 7, 1863, 1.

under his nose.⁵²⁸ Loud cheers and applause were reported when Woodward and Lowrie were nominated and a resolution was adopted requesting Woodward not resign his seat on the Pennsylvania Supreme Court until he won the gubernatorial election.⁵²⁹ Committee Chairman Francis W. Hughes finished the June 17th proceedings by speaking in support of the Woodward motion. He remarked that due to the “alarming crisis” of the moment, with the state “stripped of her sovereignty” and an “Austrian system of provost marshals” imposed, Woodward was needed on the bench as the “last entrenchment behind which the people can take refuge” in order to avoid abandoning all state sovereignty.⁵³⁰ With the close of the convention, constitutional conservatives had their candidates in Woodward and Lowrie alongside renewing their commitment to the constitutional arguments against conscription they had made in the public constitutional debates.

The convention was also an opportunity to publicly assault Lincoln war measures as unconstitutional, especially the Conscription Act. Charles Biddle, who had returned from Congress in March to win the chairmanship of the Democratic State Central Committee, gave a speech reiterating the objections he made in Congress to conscription. Biddle focused on arbitrary power and constitutional tradition, arguing that the “time-honored American system of calling on the states for drafts from their militia” had been replaced by a national conscription based on “European despotisms.”⁵³¹ Like Governor Seymour, Biddle believed a judicial resolution was the best avenue for redress. Biddle informed his audience not to worry, as the

⁵²⁸ “Ratification Meeting,” *Ebensburg Democrat and Sentinel*, July 1, 1863, 2.

⁵²⁹ “Democratic State Convention: Enthusiastic & Harmonious Proceedings,” *Republican Compiler*, June 22, 1863, 2.

⁵³⁰ “Proceedings of the Democratic State Convention,” *Harrisburg Daily Patriot and Union*, June 18, 1863, 1.

⁵³¹ “Speech of Hon. Charles J. Biddle, The Vallandigham Sympathy Meeting-The Speeches and Resolutions,” *Philadelphia Inquirer*, June 2, 1863. 8.

act's constitutionality would be tested before the courts and if it was decided to be within the power of Congress, the people would ultimately decide the question through the polls.⁵³² Before the next Democratic State Central Committee meeting in September, Biddle would revisit these same themes of "military despotism," attacking the Conscription Act's conversion of all male citizens into soldiers while taking away the protection of civil justice.⁵³³

Through the newspaper debates and political action, Pennsylvania constitutional conservatives engaged in months of intense public constitutional debate over the Conscription Act focusing on its federalism defects which prepared the likes of Woodward and Lowrie to challenge the constitutionality of the act in September. However, constitutional conservatives would start their challenges to the Conscription Act first in federal court, bringing their complaints before Federal District Court Judge John Cadwalader.

Challenging the Conscription Act in Federal Court

In 1863, constitutional challenges to the Conscription Act in Pennsylvania first came before Judge John Cadwalader and the Eastern District. In two major cases, Cadwalader ultimately upheld the Act, but also showed a level of skepticism about the act which frustrated the Lincoln administration.⁵³⁴ Before Cadwalader, constitutional conservatives scored no major victories, but the battle was close and they inflicted some setbacks for the government. Most importantly, the decision in *Antrim* maintained a role for the federal courts in reviewing the decisions of the Boards of Enrollment, keeping one avenue for redress open.

⁵³² "Political Address of the Democratic State Central Committee," *Reading Gazette and Democrat*, August 22, 1863, 1.

⁵³³ "Address from the Democratic State Central Committee," *Harrisburg Patriot & Union*, September 24, 1863, 1.

⁵³⁴ See Mark A. Weitz, *The Confederacy on Trial: The Piracy and Sequestration Cases of 1861* (Lawrence: University of Kansas Press, 2005), 89-91. Cadwalader was a Democratic judge appointed by James Buchanan in 1859. Idiosyncratic nationalist lawyer and writer Sidney George Fisher thought he held sympathies with the South. Fisher believed that the petition of Charles Ingersoll in August 1862 to Cadwalader after his arrest for anti-administration comments was proof of Cadwalader's disloyalty.

After the Conscription Act passed on March 3rd, it took just over three weeks for a federal court to consider its constitutionality. On March 27th, Judge Cadwalader issued his opinion in *McCall's Case* deciding militia members became drafted soldiers of the United States army from the date of the draft order and thus subject to court-martial for an offense against the military laws of the United States. The case came out of an arrest by military officers of the United States of Cornelius McCall, a deserter who was alleged to have been drafted under the 1862 Militia Act-not the act of 1863. However, United States military officers made the arrest pursuant to Section XIII of the Conscription Act, which stated that any person drafted who failed to report at the "place of rendezvous without furnishing a substitute, or paying the authorized equivalent" would be deemed a deserter and arrested unless he could prove, by the Board of Enrollment's decision, that he was not liable to do military duty.

Judge Cadwalader started by defining what he believed to be the difference between conscription and the historic volunteer-based military organization:

"When the inhabitants of a country who are liable to be called into military service have been enrolled, and such of them as are to render the service have been ascertained by draft, and the persons thus drafted have been lawfully required to attend at an appointed time and place of muster, those who disobey are amenable to military discipline and military organization, unless the subject has been otherwise legislatively regulated. Where the government whose authority they have set at naught may by military force compel their subjection to such discipline and organization, - the system is a conscription. But where, though their offence is cognizable by a military tribunal, their disobedience is punishable only by a certain pecuniary or other penalty, and they cannot be further subjected to military discipline or detention, the system is not a conscription, as the word is now ordinarily understood. Judge Washington said, that under a system of the latter kind, a fine to be paid by the delinquent is deemed an equivalent for his service, and an atonement for his disobedience."⁵³⁵

The volunteer system was contractual and thus, punishment for desertion outside military tribunals was limited to pecuniary penalties or fines. In contrast, deserters under the Conscription

⁵³⁵ *McCall's Case*, 15 F. Cas. 1220, 1225-26 (E.D. 1863). (Citing *Houston v. Moore*, 18 U.S. 20-21.

Act were liable to military arrest, compulsion or punishment, and detention.⁵³⁶ Indeed, regular armies had been always raised by voluntary enlistment and past congressional acts which authorized calls by the President for the services of the militia were for limited periods. Yet, Judge Cadwalader found constitutional history did not show conscription to be clearly unconstitutional. Instead, the crisis necessary to make it constitutional had not yet occurred until the Civil War. He cited the Supreme Court's precedent in *Houston v. Moore* and suggested that the power to raise armies by conscription "may, at a crisis of extreme exigency, be indispensable to national security."⁵³⁷ The Civil War was such a crisis.

Cadwalader neither denied the volunteer tradition constitutional conservatives valued so highly nor did he ignore the limitations of previous militia acts. He understood the militia acts of 1792 and 1795 along with the first militia act of 1861 included the same significant limitation-military subjection of a drafted militia man only began once he was mustered into the national military service and, further, that no department or officer of the United States could compel a drafted militia man to be mustered into service.⁵³⁸ The 1792 act continued in force up to the Civil War. It enrolled every free able-bodied white male citizen between the ages of eighteen and forty-five years in the militia of the several states while leaving the drafting and procuring the attendance of drafted men to the states. Under this system, drafted men could not be coerced into service and that states and localities necessarily lacked uniform policies for carrying out a draft.⁵³⁹ Judge Cadwalader admitted that this was precisely because the 1792 and 1795 acts had

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*, 1226.

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

been “framed by men averse to the system of conscription, who never anticipated such a necessity for its adoption as has unfortunately occurred.”⁵⁴⁰

The 1862 Militia Act altered the system of seven decades out of necessity. The Militia Act of July 1862 indicated to Judge Cadwalader that Congress felt the former system was inadequate to meet the crisis of the Civil War.⁵⁴¹ He argued that the Militia Act enabled the President when states were deficient to make regulations for enrolling the militia and executing the act. The purposes of the Militia Act of 1862 remained in effect under the Conscription Act went beyond “mere enrollment” by aiming to provide for a effectual draft.⁵⁴² To Cadwalader, the precise purpose of the act of 1862 was to make the system enforceable by giving a power to compel attendance of draftees, as the term “shall be mustered in” departed from the language of the militia acts of 1792 and 1795.⁵⁴³ Thus, before the March 1863 Conscription Act, Cadwalader believed the 1862 Militia Act already established conscription with a right of compelling the attendance of the men drafted.

Nonetheless, Cadwalader noted that the Conscription Act differed from the Militia Act of 1862 with regards to the relationship between the federal government and state militias. The Conscription Act created a new and separate system from the militia acts, one run “independently of the states, a regular national army by conscription.” The Militia Act of 1862 tried to operate alongside the existing militia systems, the Conscription Act was more detailed than any system which “could have been organized for the militia under the executive regulations organized by the former act.”⁵⁴⁴ Given, these two separate and complex systems,

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*, 1227.

⁵⁴³ *Ibid.*, 1228.

⁵⁴⁴ *Ibid.*, 1230.

Cadwalader was asked to address the constitutionality of the new administrative systems set up under the act. Plaintiffs' attorneys argued that Congress could not constitutionally delegate to the President the authority to make regulations on the subjects of the Militia Act of 1862 and even if he could, the President exceeded it by sub-delegating the power to the Secretary of War.⁵⁴⁵ They felt the Militia Act infringed upon separations of power.

Cadwalader understood that the details of a compulsory draft were necessarily not simple. He answered that compliance with such requirements by state governors, in any form, was lawful and proper.⁵⁴⁶ The commands of the President, made through the War Department, were rightfully carried out through state governors—the most proper officials to execute them.⁵⁴⁷ Judge Cadwalader also found the President had the power to prescribe administrative regulations and to exercise power “through the proper executive organ of the government,” the War Department.⁵⁴⁸ The Secretary of War was the proper officer for organizing the draft and making its regulations public.⁵⁴⁹ Regulations were necessary to craft a national compulsory draft system, which Judge Cadwalader again noted there was “no practical experience of” in American constitutional tradition. Congress could not constitutionally delegate to the President legislative powers, but it could in conferring constitutional powers exercisable by the President prescribe or omit special rules or specially authorize the President to make rules. If Congress did not, the President had “authority inherent” to make regulations necessarily incidental to their exercise and could choose between legitimate means. Cadwalader's analysis was a clear victory for the

⁵⁴⁵ Further, plaintiff's counsel argued there was no authority for the delegation of powers to the state Governor or for his exercise of them through local commissioners under the War Department's rules.

⁵⁴⁶ *Ibid.*, 1230.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

government in *McCall's Case*. Yet, in dicta, he undercut the victory by seemingly opening the door for state *habeas* jurisdiction in cases arising under the Conscription Act.

Cadwalader ended his opinion by noting that the “authority of courts of the United States to issue writs” was more “limited than that of the state courts” and thus he was not “in the habit of granting the writ in any case without sufficient reason to believe that it may be a case proper for the exercise of the jurisdiction.”⁵⁵⁰ Further, “even where the principal inquiry” was whether military service as due to the United States, “important questions more proper for decision by a state court” than by a United States could “may sometimes arise, either incidentally or consequentially.”⁵⁵¹ Given that the government’s preference for litigating the constitutionality of war measures was in the federal courts in part because the administration had doubts about state *habeas* jurisdiction, it is notable that Cadwalader seems to have been open to the notion that Pennsylvania’s state courts may have been a proper venue. Still, when Cadwalader considered challenges to the Conscription Act directly in the fall, he was silent on the jurisdictional problem.

After the tumultuous events of the summer and rising discontent over the draft, Cadwalader saw a string of cases in September which moved passed the 1862 Militia Act and directly challenged the Conscription Act and its Boards of Enrollment. Cadwalader heard the combined cases of Antrim, Stingle, and Robinson, leading to a review of the whole act over the individual immediate questions. Both *Antrim's Case* and *In Re Stingle* saw Cadwalader again balance a close reading of the constitutional arguments against conscription with general support for the government’s war effort.⁵⁵² The question, thus, was whether the board’s disallowance of a claim for exemption precluded judicial inquiry into the existence of the right to appeal and

⁵⁵⁰ *Ibid.*, 1231.

⁵⁵¹ *Ibid.*

⁵⁵² “Antrim’s Case,” *Legal Intelligencer*, September 18, 1863. (Accessed from National Archives at Philadelphia, May 2016).; *Antrim's Case*, 1 F. Cas. 1062.

whether the decisions of military tribunals were conclusive and final. Cadwalader first placed limitations upon the Boards of Enrollment in *In Re Stingle* days before *Antrim*. Like *Antrim*, *Stingle* was a small victory for constitutional conservatives because it ensured the courts would maintain a role in reviewing decisions of the Boards of Enrollment.⁵⁵³ Frederick Stingle alleged he was married and between 35 and 45 years old but was not given an exemption by the board after they heard his allegations. Unsatisfied with his evidence, the Board refused to grant his claim of exemption. On a writ of *habeas corpus*, Cadwalader accepted Stingle's argument that Congress did not contemplate in passing the Conscription Act that decisions of the Board of Enrollment would be final upon claims for exemption since no person over 35 years old and married could be legally drafted.⁵⁵⁴ Determining the truth of Stingle's allegation was a proper subject for inquiry and whether the subsequent refusal of the Board nor the primary mistake of drafting him should be prejudicial.⁵⁵⁵

Cadwalader heard arguments on whether the courts had a right to review whatever decisions might be made by the Board of Enrollment and whether the Conscription Act was constitutional.⁵⁵⁶ The government contended that the Conscription Act "created soldiers of the United States" of *all* "abled-bodied citizens" between twenty and forty-five and that the Board of Enrollment was a military court which could not be reviewed on *habeas corpus* by a civil tribunal.⁵⁵⁷ The September argument foreshadowed arguments the government would later turn to in the *Kneedler* case. United States Special Counsel John C. Knox, alongside Assistant United

⁵⁵³ "The Conscription Law," *The Adams Sentinel*, September 15, 1863. 2.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ "Legal Intelligence," *Philadelphia Press*, September 5, 1863, 4.

⁵⁵⁶ "Habeas Corpus in the Case of a Conscript," *Philadelphia Inquirer*, August 27, 1863.

⁵⁵⁷ "The Case of a Conscript," *Philadelphia Inquirer*, August 28, 1863. Before releasing his decision, Cadwalader concluded that the case involved constitutional questions that might cause him to make a decision regarding the constitutionality of the Conscription Act. "The Stingle Habeas Corpus Case," *Philadelphia Inquirer*, August 31, 1863.

States Attorney Joseph Hubley Ashton and Philadelphia District Attorney George Alexander Coffey, appeared for the Government.⁵⁵⁸ They argued Article I, Section VIII gave Congress power to “raise and support armies,” to call forth the militia to suppress insurrection, to organize the militia in service of the United States, and paired with the “necessary and proper clause,” gave the federal government “ample power to require military services of the people.” The judiciary had “no power” to control the exercise of discretion, including whether armies were raised by volunteerism or compelling certain clauses of persons.⁵⁵⁹

Further, exemption of service, Knox argued, was out of grace and not a right. The Board of Enrollment held general jurisdiction over any persons drafted under the Conscription Act and any decision on a claim for exemption was final. Young Democratic lawyer Charles Buckwalter, counsel for Stingle, contended the court need only to decide the meaning of Section IX of the act and not the constitutionality of “obtaining the army” by conscription.⁵⁶⁰ Enrollment had to occur before the draft or impressment. The entire national forces as defined were not to be called out at once.⁵⁶¹ Courts could review the decisions of the board because they needed to ascertain whether citizens came under the provision of the law. Congress could not have been granted constitutionally the exercise of “arbitrary control to an unlimited degree” over citizens through the boards. Co-counsel George Wharton argued that the Board of Enrollment could not be treated

⁵⁵⁸ In December, Knox and Coffey would represent the government in *Kneedler*.

⁵⁵⁹ “The Case of the Conscript Stingle,” *Philadelphia Inquirer*, September 2, 1863.

⁵⁶⁰ “And be it further enacted, That for greater convenience in enrolling, calling out and organizing the national forces, and for the arrest of deserters and spies of the enemy, the United States shall be divided into districts, of which the District of Columbia shall constitute one, each Territory of the United States shall constitute one or more, as the President shall direct, and each Congressional district of the respective States, as fixed by a law of the State next proceeding the enrollment, shall constitute one. Provided, That in States which have not by their laws been divided into two or more Congressional districts, the President of the United States shall divide the same into so many enrollment districts as he may deem fit and convenient.” Congressional Record, 37th Cong. 3d. Sess. Ch. 74, 75 (1863).

⁵⁶¹ “The Case of the Conscript Stingle,” *Philadelphia Inquirer*, September 2, 1863. Buckwalter, a graduate with “great credit,” had “speedily advanced to the foremost rank in the profession” and was twice nominated for Congress. “City Bulletin: Obituary,” *Daily Evening Bulletin*, August 3, 1868, 5.

as a coordinate branch of inferior judicial body, since its officers were not appointed under Article II requirements.⁵⁶²

Cadwalader determined that the truth of Stingle's allegation was a proper subject for inquiry and neither the subsequent refusal of the board nor the primary mistake of drafting him should be prejudicial.⁵⁶³ The *Stingle* decision was likely among the cases which upset the administration giving that Lincoln held his cabinet meeting over the Pennsylvania courts days later. The Philadelphia *Press* reported an "immense increase to the habeas corpus business of the court" in two days, with some already heard and disposed of. Cadwalader admitted frankly that the boards were entrusted with a "most delicate duty" and perhaps decisions were "more readily determined by them than by a court." Yet, if questions of law were raised, he would rule on them before referring the decision back to the board and if they refuse to discharge a party, under *McCall's Case*, parties were entitled to a discharge.⁵⁶⁴

Cadwalader was not done frustrating the Lincoln administration. Days later, in his *Antrim* opinion, he ultimately upheld the power to conscript, but reserved a role for judges in reviewing the decisions of the Boards of Enrollment. He did not explicitly argue the role was exclusive to the federal courts. Notably, Supreme Court Justice Robert Grier, sitting with Cadwalader on the Eastern District, endorsed the decision.⁵⁶⁵ In *Antrim*, the case arose out of a *habeas* petition from a citizen duly drafted and notified who asked for an exemption before the Board of Enrollment. Despite Antrim's status as the only son of a widow, an exemption was not given. The question

⁵⁶² As discussed in Chapter five, Wharton was a prominent Democratic attorney in Philadelphia who would be among the quartet of plaintiff attorneys in the *Kneedler* case.

⁵⁶³ "Legal Intelligence," *Philadelphia Press*, September 5, 1863, 4.

⁵⁶⁴ "Legal Intelligence, United States District Court-Judge Cadwalader," *Philadelphia Press*, September 7, 1863, 3.

⁵⁶⁵ David M. Silver, *Lincoln's Supreme Court*, (Urbana: Tee University of Illinois Press, 1967), 180; *Washington National Intelligencer*, September 11, 1863, 3.

before the court was whether acts of “mere submission to military authority, where obedience would have been compellable,” and the temporary acquiescence to their control was a waiver of the right to appeal. Cadwalader wished to avoid or prevent “unnecessary judicial interference with consummated military organizations embracing such parties” if drafted men had had fair opportunity after disallowance of their claims of exemption to obtain elsewhere judicial investigation of their alleged rights.⁵⁶⁶

The Conscription Act had, as Cadwalader noted, provided for the organization of a national military force by enrollment, draft, and impressment.⁵⁶⁷ The act had to be interpreted so that “usurpation of power, beyond the legislative authority conferred by the Constitution may not be unnecessarily imputed to Congress.”⁵⁶⁸ Cadwalader noted that the case was argued before him on the basis of the text of the Constitution and the statute and not “references to Congressional debates, or to debates of those who drafted the Constitution, or of those who proposed or discussed its early amendment.”⁵⁶⁹ He felt arguments concerned with original intent were at best sometimes was “not improper” and of “legal assistance” in explaining the words being interpreted, but lately, had been used too frequently. The proper inquiry was “not what may, from extrinsic sources, appear to have been intended by the men whose words are in question, but what was the legal meaning and application of the words when used.”⁵⁷⁰ When the meaning of a word was doubtful or had changed, the language of such discussions sometimes served, “in some degree, the purpose of a glossary.”⁵⁷¹ Cadwalader different from other

⁵⁶⁶ Antrim’s Case, 1 F. Cas. 1062.

⁵⁶⁷ *Ibid.*, 1063.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

constitutional conservatives, as he preferred to focus solely on strict construction of the text as opposed to constitutional conservatives who preferred to employ historic originalism.

Looking at federal power to pass the Conscription Act generally, Cadwalader agreed with constitutional conservatives that the powers given by the Constitution to raise and support armies were distinct from the powers conferred as to the militia of the respective states. As Cadwalader recognized in *McCall's Case*, the national army had always been raised by voluntary enlistment and until the 1862 Militia Act, the penalty for not serving when drafted into the state militia to be called out into the service of the United States was merely pecuniary.⁵⁷² The 1862 Militia Act first authorized impressment into military service of the United States of citizens drafted from state militias. For Cadwalader, as he argued in *McCall's Case*, Supreme Court precedent which established the constitutional basis for the Militia Act of 1795 supported the constitutionality of the Militia Act of 1862. No absolute authority was given by military authority over citizens not yet in service. Jurisdiction of military law was limited to those lawfully drafted and whom already owed military service. There was previously no question to be opened by a writ of *habeas corpus* over liability to serve or the lawfulness of drafting. The Conscription Act created a question of whether a military commission could decide the original question of liability to serve with absolute authority bypassing the review of state or federal court review.

The power to create provisions for the preparatory enrollment and those for the draft were separate and distinct. Cadwalader reasoned that there must be some limit on the federal power to conscript. As he noted, the “most unlimited system of mere enrollment could not be constitutionally objectionable” but a system of drafting “might be arbitrary and latitudinarian to such an extent as to encroach upon constitutional rights.”⁵⁷³ While the federal power to conscript

⁵⁷² *McCall's Case*, 15 F. Cas. 1226.

⁵⁷³ *Antrim's Case*, 1 F. Cas. 1064.

itself did not cause constitutional problems for Cadwalader, the system created to enforce it still could. He did not entirely deny constitutional conservative views of constitutional history. Indeed, he recognized the framers' concerns and jealousy over the power to raise armies but felt that worry manifested itself only through the fixed limitation on appropriation of money for the raising of armies to two years. The power to enact the Conscription Act came exclusively from the power to raise armies. Yet, Cadwalader recognized an upward limit on federal power. The "necessary and proper" clause did not allow for the enlargement of the power to raise armies, as the incidental authority of the clause could not be extended beyond the "limits of the principal power."⁵⁷⁴ Otherwise, Cadwalader worried as other constitutional conservatives did that a government "previously republican" with armies raised under a draft and impressment "administered without any restrictions" would force male citizens to serve at the "will of the chief Executive" without any limitation of the *time of service*, thereby establishing a military government.⁵⁷⁵ However, these observations about the constitutional limitations on implied powers did not cause Cadwalader to declare the Conscription Act unconstitutional. Rather, he found that the "general provisions of the act (are) not unconstitutional."⁵⁷⁶ Cadwalader carefully considered the arguments before him, but while he did not agree that national conscription was unconstitutional, he granted a limited constitutional endorsement.

Like Judge Woodward's opinion in the early February case of *Clark v. Martin*, the duration of the war was a key question.⁵⁷⁷ The Conscription Act limited enrollments to three years and the exigencies of the ongoing war. Without such a time limitation, Cadwalader

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.* (format in original)

⁵⁷⁷ As discussed in chapter five, Woodward addressed the constitutionality of the "Stay Act" in this case and two others.

indicated the act would be arbitrary and thus unconstitutional. His skepticism suggested ways the Conscription Act *could* be unconstitutionally executed. The power to conscript was again only narrowly upheld. Cadwalader similarly narrowed the powers of the Boards of Enrollment. The terms of final review by the board did *not* apply to cases of those “improperly draft[ed]” because it depended neither on the question of disability or one of the exemptions specifically granted by the act. The sister cases of *Stingle* and *Robinson* did “not affect the present question,” but did also circumscribe the Conscription Act “within ascertained limits.”⁵⁷⁸ Collectively, these three cases prescribed limitations on the Boards of Enrollment in order to ensure the act was not carried out by unconstitutional means.

As a constitutional conservative, Cadwalader was concerned with upholding strict separation of powers. Therefore, he addressed what he called “executive instructions and regulations.” He wrote that executive mandates, when authorized, “promoted various useful purposes” such as uniformity in the course and modes of enforcing the act. Instructions issued under the act’s authorization for “enrolling and drafting” were not less binding than if “they had been contained in the act.”⁵⁷⁹ However, instructions without any warrant attempting to regulate the board’s exercise of duties had no binding effect. This applied to instructions regulating the “practical course of proceeding of the board” and any attempt to furnish rules for “its decision upon questions of exemption.”⁵⁸⁰ It was up to the independent boards themselves to reasonably adopt any such rules of procedure and to, with proper notice, apply them to parties before them. The Boards of Enrollment were meant to be treated like ordinary courts martial.⁵⁸¹ The

⁵⁷⁸ *Ibid.*, 1065.

⁵⁷⁹ *Ibid.*, 1066.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Courts martial were military trial courts for criminal violations of the Uniform Code of Military Justice, which was established under Congress’s Article I power to regulate the land and naval services

constitutional *execution* of the act and the properness of the delegation by Congress hinged on avoiding arbitrary action. The independence given to the boards in their jurisdiction did not allow them to exceed the limitations of being a “mere military commission.”⁵⁸² The powers conferred on the board could only be exercised as if Congress had conferred them upon any officer of the army.

For Cadwalader, the requirements of Section XIV of the Conscription Act that any claims of exemption be made before the local military commission or board be “reasonable and convenient” made claims merely permissible and not a matter of right.⁵⁸³ However, the court was asked whether the act properly treated the decision of the commission or board to be a final “precluded inquiry here as to his right which was in question before the board.” Like courts martial, the board’s independence of executive supervision meant independence of revision with regards to proceedings. Thus, any findings and sentences did not ordinarily take effect even provisionally until revision. The meaning of the word “final” was clear to Cadwalader. He had no doubts that decisions by the boards were made final and “yet not conclusive elsewhere as to the right was in question.”⁵⁸⁴ If the word “final” was not circumscribed as such, it would have made the act unconstitutional. Further, even if exemption from military service was specified in the act, it did not make exception a right. Exemption from the draft was a privilege and not a right granted by the Constitution. Moreover, rights granted by exception from a general

⁵⁸² *Ibid.*

⁵⁸³ And be it further enacted, That all drafted persons shall, on arriving at the rendezvous, be carefully inspected by the Surgeon of the Board, who shall truly report to the Board the physical condition of each one; and all persons drafted, and claiming exemption from military duty on account of disability, or any other cause, shall present their claims to be exempted to the Board, whose decision shall be final.” Congressional Record, 37th Cong. 3d. Sess. Ch. 74, 75 (1863). Orders from Provost Marshal James Fry in July stated that any person drafted claiming disability had the right to have the question of their disability heard by the Board of Enrollment, but their decision was final. *United States War Department, The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, Series III, Volume III* (Washington: 1899), 535.

⁵⁸⁴ *Antrim’s Case*, 1 F. Cas. 1066 (citing 2 Peters 463; 4 Serg. & Wale 211).

enactment of Congress could not affect the question of constitutional power. Thus, if the power of “absolute selection” was directly conferred upon commissioners or a commissioner, the question would only be as to the conditions imposed *not* the power itself. Thus, the power to conscript did not appear to pose “constitutional difficulty.”⁵⁸⁵

Cadwalader’s careful examination and skepticism was geared towards avoiding any unconstitutional execution of the act while not denying the power of conscription itself. Privileges or immunities enjoyed through legislative action still had to be administered constitutionally and regulated judicially.⁵⁸⁶ As armies could be constitutionally raised by conscription, the power of selection was executive and not judicial. Significantly, Congress could not constitutionally delegate its own powers to legislate, but it could confer executive and judicial powers upon those constitutionally qualified to exercise them.

Only officers nominated to the Senate and appointed with their consent were qualified, as otherwise they were inferior officers under Article II. Cadwalader looked to uphold constitutional limits on delegation of powers and narrowly uphold the act. According to the doctrine of separation of powers, the powers of such executive officers had to be limited. Inferior courts, which could be established by Congress, were not in the class of inferior officers appointed without the Senate’s consent. Therefore, “independent judicial powers could not be vested by Congress in such a commission as the Board of Enrollment unless it regarded as a tribunal simply military.”⁵⁸⁷ Thus, jurisdiction only existed over anyone who was already under military rule. In other words, while decisions could be final for purposes of military jurisdiction, they could not by act of Congress make such decisions as to the “*status* of a citizen *final*” as to

⁵⁸⁵ *Ibid.*, 1066-67.

⁵⁸⁶ Generally, “privileges or immunities” refers to rights or legal privileges.

⁵⁸⁷ *Ibid.*, 1067.

preclude any judicial cognizance elsewhere.⁵⁸⁸ Again, had Congress intended to do so, the act would be unconstitutional. Such a law would “confer a judicial power not warranted by the Constitution” and Congress could not give such military commissions or likewise court-martials any jurisdiction over persons not in military service or amenable to the military jurisdiction. Thus, Cadwalader maintained the line between military and civilian justice which constitutional conservatives were deeply concerned with-the need to maintain the opportunity for citizens to challenge their status as enrollees in civil court.⁵⁸⁹ Relatedly, Congress could not confer upon any special tribunals the power of conclusive adjudication, even to cases within its own explicitly granted jurisdiction. Cadwalader’s limitation on the expansion of the federal government’s power was significant, since Lincoln and his cabinet appeared to view his decision negatively.

Papers across the country reported Cadwalader’s decision on the 10th as being the first court to uphold the Conscription Act.⁵⁹⁰ The Philadelphia *Press* reported an “immense increase to the habeas corpus business of the court” in two days, with some already heard and disposed of. Cadwalader “frankly admitted” the boards were entrusted with a “most delicate duty” and perhaps decisions were “more readily determined by them than by a court.” Yet, if questions of

⁵⁸⁸ See *Ex parte Romano*, 251 F. 762, 764 (Dist. Ct. D. Mass, 1918) (Interprets *Antrim* for proposition that petition, if not under arrest, is entitled either to a hearing in this court on his right to exemption).

⁵⁸⁹ *Antrim’s Case*, 1 F. Cas. 1067. See *Reid v. Covert*, 354 U.S. 1, 31-32, FN 57 (1957) Supreme Court cited *Antrim* for the premise that military courts could not constitutionally try a discharged serviceman for an offense which he had allegedly committed while in the armed forces since civilians could not be tried by military court-martial.

⁵⁹⁰ “Miscellaneous News,” *New York Herald*, September 11, 1863, 6; “The Enrollment Act Declared Constitutional,” *Washington Evening Star*, September 10, 1863, 2; “The Conscription Act in Court,” *The Daily Register* (Wheeling), September 11, 1863, 3; “From Philadelphia,” *Indianapolis Daily State Sentinel*, September 11, 1863, 3.

law were raised, he would rule on them before referring the decision back to the board and if the board refuse to discharge a party, under *McCall's Case*, parties were entitled to a discharge.⁵⁹¹

If the Lincoln Administration was furious with Cadwalader, Republicans were ready to embrace Cadwalader's decision by ignoring its finer points. His constitutional analysis in the cases of *McCall's*, *Antrim* and *Stingle* received the endorsement of the likes of Sidney George Fisher, who had previously considered him a southern sympathizer. Fisher considered Cadwalader's decision to uphold the Conscription Act alongside Lincoln's September suspension of *habeas corpus* to have "weight with his party" and "take from the demagogues two of their chief topics of declamation and agitation." Here, Fisher placed the conduct of Cadwalader against Judge Woodward, confusingly arguing that though Cadwalader was an "eager partisan," he was also withdrawn from "active or ostensible participation in politics," while Woodward could not show the same "wisdom of the principle of making judiciary independent."⁵⁹² Similarly, the *Philadelphia Press* reacted to the decision by saying Cadwalader had "let down" the Copperheads, as the unconstitutionality of the Conscription Act was one of the major planks of their platform and the *Lancaster Examiner* suggested that here, a Democratic judge had "utterly demolished" what Judge Woodward's friends had so zealously labored to disseminate. Ignoring the nuances of his narrow opinion, they declared no lawyer or citizen who read Cadwalader's judgment could have a "moment's doubt" about the *entire* constitutionality of the law.⁵⁹³ Significantly, the *Press* argued that Cadwalader's decision frustrated and defeated the movement on the part of certain Democratic lawyers in Philadelphia and New York to secure

⁵⁹¹ "Legal Intelligence, United States District Court-Judge Cadwalader," *Philadelphia Press*, September 7, 1863, 3.

⁵⁹² Sidney George Fisher, *A Philadelphia Perspective*, ed. Jonathan W. White (New York: Fordham University Press, 2007), 205.

⁵⁹³ "The Conscription Act," *Philadelphia Press*, September 10, 1863, 2; "A Big Plank Knocked from the Copperhead Platform by a Democratic Judge," *Lancaster Examiner and Herald*, September 16, 1863, 2.

decisions “from certain state courts adversely to the constitutionality of the act,” since it was impossible for any lawyer or judge to answer Cadwalader’s opinion and no state court could question a federal tribunal with a different opinion.

On September 9th, the same day Cadwalader released his *Antrim* opinion, Judge John Read of the Pennsylvania Supreme Court wrote to Cadwalader to say that he agreed with him “entirely as to the constitutionality of the so-called conscription law” and that he would be glad to have a “accurate copy” of Cadwalader’s opinion.⁵⁹⁴ Read noted in the same letter that he had been informed by counsel that the same question would be brought before the Pennsylvania Supreme Court in two weeks.⁵⁹⁵ The federal courts had, as hoped by the administration, upheld the constitutionality of Congress’s power to conscription under the power to “raise armies,” but Cadwalader had also written a searching inquiry of the act’s structure. If the act could be challenged not facially, but as-applied or by individual challenge to decisions of the boards, the federal courts could still be consumed with actions to slow the draft. Constitutional challenges in Pennsylvania federal courts had not be a total defeat or disaster for constitutional conservatives. The door to individual challenges remained opened, as Cadwalader maintained a role for the judiciary for review by writ of *habeas corpus* without answering whether it was exclusive to the federal courts. Yet, the major constitutional argument against conscription had been dismissed. The battle now moved to Pennsylvania’s state courts. It would not be long, as Pennsylvania’s Supreme Court would hear argument on September 23rd to its own case challenging the constitutionality of the act.

⁵⁹⁴ John M. Read to Hon. John Cadwalader, September 9, 1863. *Cadwalader Papers*.

⁵⁹⁵ The Conscription Law: The Act Declared Constitutional, but Decisions of Boards of Enrollment not Final. *The Columbus Gazette*. September 25, 1863. 4. Soon after *Antrim* and *Stingle*, it was reported that Judge Cadwalader had been in correspondence with Supreme Court Justice Robert Grier, who sat with Cadwalader and was present when the opinion was read but not for oral argument, “assented” to the decision of the principles of law in the decision.

CHAPTER V: THE HIGH WATERMARK FOR CONSTITUTIONAL CONSERVATIVES: KNEEDLER

V. LANE

In the summer of 1863, Pennsylvania State Supreme Court Justice George Woodward was in the middle of his campaign for governor and seemed aware he would soon have to decide on the Conscription Act's fate. Not only were constitutional conservatives publicly interested in a judicial solution, but he was asked directly about a potential legal challenge by former President James Buchanan. On July 25th, six days before that case was filed before Woodward, he received a letter from Buchanan concerning the constitutionality of the Conscription Act.⁵⁹⁶ Buchanan thought that while the law was "unwise and unjust," it was not unconstitutional.⁵⁹⁷ Although he expected Justice Woodward would rule conscription unconstitutional, he felt the court should uphold the law.⁵⁹⁸ By the time Woodward responded to Buchanan in September, the *Kneedler* case was before him and he had issued orders for the full court to hear argument. Woodward had considered "with great respect" Buchanan's suggestions as to the constitutionality of the Conscription Act.⁵⁹⁹ However, because the question was pending in the Pennsylvania Supreme Court, Woodward desired to avoid any conclusions on the matter and not "intimate any until [he] shall have had the benefit of an argument." All eyes, from Buchanan to

⁵⁹⁶ James Buchanan to George W. Woodward, July 25, 1863, in Jonathan W. White, "A Pennsylvania Judge Views the Rebellion: The Civil War Letters of George Washington Woodward," *Pennsylvania Magazine of History and Biography*, Vol. 129, No. 2 (April 2005), 217.

⁵⁹⁷ *Ibid.* In a letter to Lancaster attorney Augustus Schell, Buchanan wrote that the power to "raise and support armies" was power without "any other limitation" except on appropriations. He asked how else armies would be raised-were they truly limited to volunteers and Congress could not resort to conscription as a necessary and proper means, as used by other nations. James Buchanan Papers, Historical Society of Pennsylvania.

⁵⁹⁸ White, "A Pennsylvania Judge Views the Rebellion," at 217.

⁵⁹⁹ *Ibid.*

Lincoln, were on the decision of Woodward and his brethren. Woodward was not about to show his hand or make any promises he could not keep.

For constitutional conservatives, *Kneedler v. Lane* was the most significant case during the Civil War. The three plaintiffs were represented by four prominent Philadelphia Democratic attorneys who were already invested and involved in the public constitutional debate over conscription. Throughout the public debate in 1863, constitutional conservatives hoped and prepared for such an opportunity to win a constitutional battle in the courts. They had reached the state supreme court with a challenge to the Conscription Act aided by their most finely-tuned arguments. This was the best opportunity to strike a decisive, constitutional blow against the Conscription Act. Yet, even with a favorable November decision, there would be no final judgment nullifying the Conscription Act. The federal government acted decisively to reverse the decision and avoid any appeal to the United States Supreme Court. Within a matter of months, constitutional conservatives saw their most important judicial victory completely fall apart once constitutional nationalist Daniel Agnew replaced Chief Justice Lowrie and the federal government promptly sought to dissolve the injunctions against the act.

The Kneedler Lawyers:

At the time the *Kneedler* was filed on July 31, 1863, the three plaintiffs attorneys initially involved were well-known constitutional conservatives. Charles Ingersoll was a leading spokesman among Pennsylvania Democrats in 1863 who headed the Central Democratic Club of Philadelphia. George Mifflin Wharton was his vice president at the Central Democratic Club and a former United States Attorney General for the Eastern District of Pennsylvania.⁶⁰⁰ George Biddle was Chancellor of the Philadelphia Bar whose distant cousin Charles John Biddle, the

⁶⁰⁰ Wharton was appointed by Buchanan to replace the removed James D. Van Dyke. "Removal of Attorney General Van Dyke," *Lehigh Register*, April 25, 1860, 2.

one-time Congressional representative, was editor-in-chief of the *Philadelphia Age* and chairman of the Democratic State Central Committee.⁶⁰¹ These three prominent Democratic citizens collectively brought the *Kneedler* case on behalf of three citizens of Philadelphia.⁶⁰² By the time of oral argument in September, Peter McCall, the former Democratic mayor of the city and secretary of the Philadelphia bar, was also added to the legal team.⁶⁰³ All were marred by allegations of disloyalty by the Republican press, but Biddle and Wharton were respected attorneys with good reputations among the local bar and were experienced before the Pennsylvania Supreme Court.⁶⁰⁴

Like the Biddles, the Ingersolls were a distinguished Philadelphia family. Charles' father was a prominent Congressional representative and district attorney who infamously attacked the John Tyler administration during the "public funds" controversy of 1844 and whom supported conscription in 1814. Charles Ingersoll was a recalcitrant Democrat who first made a name for himself in August 1862 when Provost Marshal William H. Kern arrested him for disloyal speech. According to Sidney George Fischer, a public intellectual and Lincoln supporter who married into the family, Ingersoll was "wild and rabid about secession and the South."⁶⁰⁵ In the opinion of Fisher, Charles was an intransigent man imbued with the "narrowest partisan passions" and "wholly insensible to argument" and ready to use violence and physical force to carry out his

⁶⁰¹ In February 1864, Wharton would also become Chancellor of the Philadelphia Bar. Charles Biddle was the son of Nicholas Biddle, President of the Second National Bank and infamous for his role in the "Bank war."

⁶⁰² "The Courts," *Cincinnati Daily Enquirer*, August 6, 1863, 1.

⁶⁰³ McCall was also a member of the Historical Society of Pennsylvania going back to 1830 and recognized upon his death in 1880 for his "capacity for historical research" and had given a discourse in 1838 on the Judicial History of Pennsylvania, considered by his peers a "remarkable paper." See "The Hon. Peter McCall, Extracts from the Minutes of the Historical Society of Pennsylvania, at its meeting held November 8th, 1800," *Papers of Peter McCall* (Philadelphia: Historical Society of Pennsylvania, 1880), 1-2.

⁶⁰⁴ The Philadelphia Bar lists both Biddle and Wharton among its "Legends of the Bar." (visited July 5th, 2018) <http://www.philadelphiabar.org/page/AboutLegends?appNum=3>

⁶⁰⁵ Sidney George Fisher, *A Philadelphia Perspective: The Civil War Diary of Sidney George Fisher*, Ed. Jonathan W. White (Fordham: Fordham University Press, 2007). 405-406, 433-434; Greenberg, "The Aristocrat As Copperhead," 196—97.

views.⁶⁰⁶ New York republican papers depicted Ingersoll as “very little of a Democrat” or much of a politician who blossomed as a partisan under Buchanan’s administration and became a Southern sympathizer under Lincoln’s.⁶⁰⁷

Despite attacks on his reputation by Republicans, Ingersoll was a leading Democratic spokesman in Pennsylvania. In that role, his public speeches made clear that he felt that the executive branch was assuming unconstitutional war powers like conscription, declaring martial law and suspending *habeas*.⁶⁰⁸ He saw the war policies of the Lincoln Administration as threatening antebellum federalism and state institutions by “cancelling” the compact and ensuring that the state no longer had an army nor rule by the Constitution.⁶⁰⁹ As a practicing attorney, Ingersoll in June 1863 defended a soldier before Judge Cadwalader for the charge of resisting the draft, arguing that the enrolling was distinct and separate from the draft and that there could an enrollment without a draft.⁶¹⁰ He was also familiar with both Judge Lowrie and Thompson, as all attended a celebration of Washington’s birthday in February at the Central Democratic Club.⁶¹¹ Given his role with the Central Democratic Club, Ingersoll was not only

⁶⁰⁶ Fisher, *A Philadelphia Perspective*, 437, 447.

⁶⁰⁷ “Mr. Charles Ingersoll,” *Pittsburgh Daily Gazette & Advertiser*, August 30, 1862, 2. The *Chicago Daily Tribune* referred to Ingersoll as a “very poor lawyer” and “exceedingly malignant Copperhead.” The *Evening Bulletin* called his March speech the “rankest treason and the flattest nonsense uttered” on the evening. Ingersoll had called for state governors to respond to the seizure of Democratic papers by seizing the government officials in question as a matter of states’ rights. “A Terrible Copperhead,” *Chicago Daily Tribune*, March 20, 1863, 2. “Freedom of Speech,” *Chicago Daily Tribune*, May 30, 1863, 2.

⁶⁰⁸ Greenberg, “The Aristocrat As Copperhead,” at 204. During a September speech, Ingersoll told voters that a Democratic win would be in favor of liberty and rights, while a Republican victory would be for “usurpation and tyranny.” “Meeting at the Democratic Club Room,” *Philadelphia Press*, September 10, 1863, 4.

⁶⁰⁹ Charles Ingersoll, *Speeches: Ingersoll, Charles, 1805-1882* (self-published), 317.

⁶¹⁰ “Legal Intelligence,” *Philadelphia Inquirer*, June 7, 1863; “Resisting the Enrollment Act in Bucks County,” *Philadelphia Press*, June 15, 1863, 1. District Attorney George Coffey represented the Government before Cadwalader in this case, *Shillenbeger & Barnat v. Yardley*. The same month, both attended and spoke at a bar meeting in honor of the late Colonel J. Richter Jones, killed in battle. “The Late Colonel Jones,” *Philadelphia Press*, June 1, 1863, 4.

⁶¹¹ “R O’Gorman at Concert Hall,” *Philadelphia Press*, February 24, 1863, 2. Peter McCall was present as well, to read from Washington’s “Farewell Address.” The speaker, Mr. O’Gorman, was sure to criticize the unconstitutionality of the war measures.

cordial with Judge Woodward but had given speeches in favor of his candidacy.⁶¹² These were constitutional conservatives and Democrats who were known to each other.

George Washington Biddle held the best reputation as a lawyer among the plaintiffs' attorneys. By the end of his legal career in the 1880s, he had become Chancellor of the Bar Association of Philadelphia, reflective of his reputation as being "brilliant" and associated with "distinction" in running his large private practice.⁶¹³ Like Wharton and Ingersoll, he had experience before the Pennsylvania Supreme Court against the government. Biddle, for instance, represented William Hodgson in the "Jeffersonian" case before Chief Justice Lowrie in February which dealt with the authority of the President to order district attorneys to seize property considered to be aiding and abetting the rebellion.⁶¹⁴ In his later years, Biddle lectured on constitutional development under Taney and made clear his own commitment to strict constructionism. He called Taney, next to Marshall, the "greatest" of the Chief Justices and

⁶¹² "Our Nominees," *Erie Observer*, June 27, 1863, 2.

⁶¹³ See *Encyclopedia of Pennsylvania Biography: Illustrated, Volume 13* (Lewis Historical Publishing Co., 1921), 202 Biddle was one of the "most eminent of Philadelphia lawyers," with a very large private practice and some public positions. In the nineteenth century, to most lawyers in Philadelphia, Chancellor of the Bar Association was the highest professional achievement a lawyer could ever achieve and included the greatest lawyers of the nineteenth century in Philadelphia law. Robert R. Bell, *The Philadelphia Lawyer: A History, 1735-1945* (Susquehanna University Press, 1992), 167. When lifelong friend Philadelphia District Judge George Sharswood introduced Biddle for an 1889 law lecture, he spoke to having the "highest admiration of his qualities as a man, a citizen, an advocate, and a jurist." *Constitutional History of the United States As Seen in the Development of American Law: A Course of Lectures Before the Political Science Association of the University Of Michigan* (New York: G.N. Putnam & Sons, 1889), 16. Sharswood shared a law office with Joseph Ingersoll, Charles' brother early in his legal career and had been a student of Charles Jared Ingersoll, whom Sharswood called the "most distinguished member of the Philadelphia bar in its palmy days." He also knew Biddle well enough that they were friends who attended a political Economy Club together in Philadelphia. Samuel Dickson, "George Sharswood: Teacher and Friend," 55 Am. L. Reg. 401, 425 (Oct. 1907).

⁶¹⁴ "Legal Intelligence," *Philadelphia Press*, February 4, 1863, 4. Hodgson, who edited the *Jeffersonian* in West Chester, Pennsylvania, was described as "an opinionated and colorful newspaper." Hodgson had "Copperhead leanings" who would "rather die" than give the pledge demanded of him by U.S. attorney George A. Coffey. Carl B. Swisher, *The Taney Period: 1836-1864* (Oxford: Oxford University Press, 1971), 912-13. Even after the Attorney General told Coffey to drop the case, Hodgson brought suit for trespass before Chief Justice Walter Lowrie. The case was transferred to the United States Circuit Court by Justice Strong under the March 3 *Indemnity Act* and put before Justice Grier. The *Philadelphia Press* called Reed, Biddle, and Hiester Clymer the "angry trinity" with "malevolence against the Union" in their certainty the war measures of the Lincoln administration were tyrannical, arbitrary, and unconstitutional. "Letter from 'Occasional'," *Philadelphia Press*, April 7, 1863, 2.

found on a “careful reading” of his opinions that Taney’s opposition to centralization of power. In his speech, Biddle referred to Taney as the “presiding genius” of the court whose judgments with rare exception were correct “expositions or the law of the land” known for “sound and weighty reasoning.”⁶¹⁵ Biddle singled out Taney’s opinion in *United States v. Morris* as showing his refusal to go beyond the plain meaning of a statute, as the “evident intention of the legislature ought not to be defeated by a forced and overstrained construction.”⁶¹⁶ Biddle praised Taney’s opinions as characterized by “close adherence” to the language of the Constitution with no powers construed by him to exist in it “not found in its words.” Taney too was “anxious” to protect the states in their “full and unfettered exercise” of the powers retained by them.⁶¹⁷ Biddle evidently saw Taney as the embodiment of strict constitutionalism fundamental to the arguments of constitutional conservatives in 1863. He was a serious, respected lawyer with a commitment to strict constructionism, but Republicans still suspected he was another southern sympathizer.

George Mifflin Wharton was an “Old Line Whig” Democrat who was involved in cases against the Lincoln administration going back to the early months of the war. He was one of the most active members of the bar association and like Biddle, was a respected attorney who had a long, successful legal practice.⁶¹⁸ Wharton served for a year as the United States district attorney for the Eastern District of Pennsylvania before returning to private practice in 1861. In June 1861, Wharton joined George H. Williams as council to defend three of the Baltimore rioters who burned a bridge in April 1861 in the *Merryman* case before Chief Justice Taney. *Merryman*

⁶¹⁵ *Constitutional History of the United States*, 125.

⁶¹⁶ *Ibid.*, 144.

⁶¹⁷ *Ibid.*, 195-96.

⁶¹⁸ “Legends of the Philadelphia Bar,” <http://www.philadelphiabar.org/page/AboutLegends?appNum=3> (visited July 10, 2018); Mark A. Weitz, *The Confederacy on Trial: The Piracy and Sequestration Cases of 1861* (Lawrence: University of Kansas Press, 2005), 87. (Weitz notes that Wharton had an “impeccable reputation as a skilled attorney” and was one of the city’s “most distinguished citizens”)

saw Taney declare Lincoln's suspension of *habeas corpus* unconstitutional.⁶¹⁹ That fall, Wharton defended the rebels involved in the *Jeff Davis* sequestration case in 1861 before Judge Cadwalader and Justice Grier in Philadelphia.⁶²⁰ He had also been the defendant's council in the case of *Cox v. Martin* before Justice Woodward in February and for the petitioner in *McCall's Case* before Judge Cadwalader concerning the Militia Act of 1862. Wharton had long been involved in politics, rising as far as Chairman of the Democratic State Convention in 1859.⁶²¹ At a March 1863 Democratic Central Club meeting, Wharton depicted Democrats as the "calm" party, not the "revolutionary" one, reflecting his constitutional conservative outlook. Yet, signaling a preference for the old republic, he would rather be a "freeman in a divided territory than a slave in a united despotism."⁶²²

As prominent Democrats, all of the plaintiffs' attorneys were politically active within the party. Weeks before the convention, all but Wharton participated in a mass meeting at Independence Square to protest the unconstitutional arrest and banishment of Clement Vallandigham. Resolutions from the mass meetings spoke to the need to restore state authority by the ballot, "protect state rights" and "rebuke and check federal usurpation."⁶²³ Ingersoll gave an "elegant dissertation" upon the cheers of the crowd on states' rights, as the "blessed rights of the states were our only guarantee of security."⁶²⁴ The plaintiffs' lawyers were a mix of respected

⁶¹⁹ "Bridge Burners Before Philadelphia Court," *Philadelphia Press*, June 3, 1863, 1. The case came before Judge John Cadwalader, brother of General Cadwalader. The history of the case is complicated. Militiaman John Merryman was imprisoned on May 25th as a rioter and saboteur who burned several bridges around Baltimore. Taney issued a writ of *habeas corpus* on May 27, but General Cadwalader refused Taney's summons on the basis of Lincoln's April suspension of the writ. On June 1, acting in his capacity as a federal circuit judge, Taney released an opinion on the case in *Ex Parte Merryman*. See Jonathan W. White, *Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman* (Baton Rouge: Louisiana State University Press, 2011), 1-2.

⁶²⁰ Weitz, *The Confederacy on Trial*, 87-90.

⁶²¹ "The Democratic State Convention," *Lebanon Advertiser*, March 23, 1859, 2.

⁶²² "The Fifth Ward Democracy in Council," *Philadelphia Press*, March 18, 1863 2.

⁶²³ "Monster Mass Meeting in Independence Square," *Harrisburg Patriot & Union*, June 3, 1863, 1.

⁶²⁴ "Disloyal Gathering in Independence Square," *Philadelphia Pres*, June 2, 1863, 2.

attorneys and more overtly political figures like Ingersoll. Yet, all were constitutional conservatives intimately involved in the Democratic Party and the crafting of arguments in the public constitutional debate during 1863. By the end of July, they had procured a lawsuit ready to give their best strike against the Conscription Act.

The Judges

In the nineteenth century, judges and lawyers were often integrally involved in politics, as the antebellum period saw a “national revolution in judicial politics” when many states including Pennsylvania and New York adopted judicial elections.⁶²⁵ Political organizations themselves could and did act as vehicles for constitutional rhetoric and action. Pennsylvania’s judges, including its Supreme Court, were elected and thus its judges necessarily involved in politics. The three judges in the *Kneedler* majority, Walter Lowrie, George Washington Woodward, and James Thompson, were all Democrats involved to varying degrees in party politics. They were all likely aware of the public constitutional debate over conscription before they heard arguments against the Conscription Act through both Democratic newspapers and the party meetings, they all attended throughout 1863. Woodward stands out from the trio, as he was frequently confronted with questions about his constitutional views during his campaign for governor. Woodward often demurred and said little in public, but the process made him keenly aware of the public interest in the constitutional status of conscription.

In June 1863, Woodward accepted the Democratic nomination for governor of Pennsylvania as a constitutional conservative candidate with a long history of fidelity to Jacksonian principles. He was a native of Wayne County who graduated from Geneva Academy alongside New York Democratic Governor Horatio Seymour. Woodward entered the study of

⁶²⁵ Shugerman, *The People’s Court*, 102-105. As noted in the introduction, Shugerman points out states made this move to favor judicial independence as a means of combating legislative corruption.

law at just 19 in 1828 and became known for his “clear legal and logical mind.”⁶²⁶ He first made a name for himself in politics with his participation in the Pennsylvania Constitutional Reform Convention of 1837-38 where he proposed an amendment to disenfranchise immigrants.⁶²⁷ Critics called it his “Know-Nothing” speech, a repeat of the backlash he faced upon his nomination to the Supreme Court in 1846 and the Pennsylvania Supreme Court in 1852.⁶²⁸ Democrats looked to protect Woodward by citing the records of the convention, where Woodward claimed that he did not propose to exclude foreigners in any way, but rather proposed inquiring into the expediency of preventing foreigners arriving after 1841 from voting or holding office.⁶²⁹ In an 1852 letter, Woodward disclaimed responsibility for the resolution and suggested the speech attributed to him was one he never gave nor ceased to condemn.⁶³⁰ Yet, despite the embarrassment of the 1837 convention gaffe, to Woodward, the key event of his political career was undoubtedly his failed nomination to the Supreme Court in the winter of 1845.

⁶²⁶ “Hon. George W. Woodward,” *North Branch Democrat*, July 8, 1863, 2.

⁶²⁷ “Irishmen! Listen!” *Harrisburg Evening Telegraph*, October 9, 1863, 2 (telling Irishmen to remember Woodward’s disenfranchisement scheme directed “entirely against” the Irish); “Judge Woodward on Foreigners,” *Philadelphia Press*, September 12, 1863, 2 (When an amendment to prohibit freed blacks, fugitive slaves, and foreigners from entering the state, Woodward proposed altering the language to prevent any foreigner from acquiring the right to vote or holding office, knowing that the original language was unconstitutional. In his speech before the Convention, Woodward defended his proposal, saying that emigrants who still have all civil and natural rights except for political privileges, as he suspected immigrants often did not have knowledge of American privileges or institutions).

⁶²⁸ “Judge Woodward and Foreigners,” *Franklin Repository*, August 5, 1863, 4 (Woodward showed “bitter hostility” to foreigners during the convention, desiring restrictions because other the state would “squander” the privileges of citizens, and only in 1862 did he seek to “modify” the record once he was running for re-election of his Supreme Court seat).

⁶²⁹ “The Charges Against Judge Woodward,” *Lebanon Advertiser*, August 26, 1863, 2 (interpreting Woodward’s comments at the convention as proof he defeated the amendment and attacking Governor Curtin and Simon Cameron as the “Know Nothing” leaders of the past).; Stanton Ling Davis, *Pennsylvania Politics: 1860-1863*, 308 (1935) (Davies mentions that both Curtin and Woodward were portrayed as hostile to foreigners, with the Unionists pointing out that Woodward supported this motion to prevent any foreign from acquiring the right to vote or hold office if they came after July 4, 1861, while Democrats pressed Curtin’s swearing and initiation into the Know-Nothings in 1853).

⁶³⁰ *Republican Compiler*, August 24, 1863, 2.

In December 1845, Woodward was nominated to the Supreme Court by President James Polk due to his strict constructionism. As Polk recorded in his diary, Woodward's nomination was supported by Vice President Dallas and Pennsylvania Congressman David Wilmot with "great confidence" as a "sound, original and consistent Democrat of the strict construction school" chosen for his judicial philosophy.⁶³¹ According to Woodward's biography, Woodward saw his failure to secure the Supreme Court nomination as a reflection of partisanship and disloyal Democrats under Simon Cameron in Congress.⁶³² Polk's diary confirmed that Simon Cameron and five other Democratic Senators had abandoned Woodward's nomination in support of Secretary of State James Buchanan, who supported John M. Read's nomination instead.⁶³³ Vice President Dallas informed Polk that Cameron pushed to reject Woodward even though he was "eminently qualified, of irreproachable character" and was a "sound republican" in his constitutional opinions. Cameron's cohort of Democrats combined with Whigs to reject Woodward by a 29 to 20 vote in part because Woodward was considered a free trader hostile to tariffs who was not sufficiently loyal to the caucus.⁶³⁴ Woodward's nomination may have failed, but it mattered that Polk selected Woodward for his strict constructionism and restraint as a

⁶³¹ Diary of James K. Polk, Vol. I., 138. Polk apparently nominated Woodward as a surprise after meeting him and being so taken with his intellectual abilities. Daniel J. Curran, "Polk, Politics and Patronage: The Rejection of George W. Woodward's Nomination to the Supreme Court," *Pennsylvania Magazine of History and Biography*, vol. 121, No. 3 (Oct. 1997), 192.

⁶³² George A. Woodward, *Biography of George Washington Woodward* (1924). The biography, written by Woodward's son, incredibly refers very little to Woodward's time on the Pennsylvania Supreme Court, but focuses on the political affairs of 1838 and 1845. Fifteen years later, wrongly believing that Chief Justice Taney had resigned and his friend Jeremiah Black, then the Attorney General for Buchanan, was to succeed him, Woodward stated his desire to be the Reporter of the Supreme Court when the chance for appointment presented itself. George W. Woodward to Jeremiah S. Black, November 28, 1860, 212.

⁶³³ Reed would later serve on the Pennsylvania Supreme Court with Woodward as a "War Democrat" who supported upholding the Conscription Act as a proper use of Congressional power.

⁶³⁴ Daniel J. Curran, "Polk, Politics and Patronage: The Rejection of George W. Woodward's Nomination to the Supreme Court," *Pennsylvania Magazine of History and Biography*, vol. 121, No. 3 (Oct. 1997), 175. Democrats also blamed the misunderstanding of the events of the 1838 Convention and Woodward's record on nativism. "Rejection of Judge Woodward," *Democratic Banner*, Jan. 30, 1846, 2.

constitutional conservative, as Polk aimed to reject the “legal innovation” and arbitrary decisions of Marshall and Story in favor of original intent.⁶³⁵

Woodward continued to mark himself as a constitutional conservative going forward. When nominated by the Democrats to the Pennsylvania Supreme Court in 1852 to replace the deceased Judge Coultier, he wrote a letter arguing that the Union was a “product of the states” best preserved by “maintaining the just rights of the states.” Woodward saw the states as preexisting the Union and as “absolutely free and independent” sovereigns that still existed in “all the plenitude of their original sovereignty.”⁶³⁶ According to his son, Woodward’s letter reflected his Jeffersonian Democratic views that were “hostile to the whole theory of centralization” and in favor of maintaining the reserved rights of the states. Thus, by the time Woodward took his seat on the Pennsylvania Supreme Court, his commitment to Jacksonian constitutional conservatism was firm.

During the gubernatorial campaign in 1863, Democratic newspapers would endorse Woodward’s candidacy on similar lines. J.S. Sanders’ *Berwick Gazette* noted that even the “abolition papers” of Philadelphia had to speak well of Woodward, with the *Bulletin* calling him an “able lawyer” and the *Inquirer* arguing the Democratic State Convention showed “good judgment” in selecting Woodward for the ticket, who held “unimpeachable character” and was an “able jurist and patriotic gentlemen.”⁶³⁷ Pennsylvania Democratic State Chairman Charles Biddle’s *The Age* called Woodward a Democrat without a blemish on his political record who had “never wavered in his devotion to the great doctrine of state rights and strict constitutional

⁶³⁵ Curran, “Polk, Politics and Patronage,” 178.

⁶³⁶ Woodward, *Biography*, 30.

⁶³⁷ “The Nominees of the Democratic Convention,” *Harrisburg Daily Patriot and Union*, July 7, 1863, 1.

construction.” Similarly, the *Reading Democrat* called him a “unwavering Democrat of the Constitutional Union school” and the Lewisburg *Argus* claimed no man in the state was more qualified and “deep rooted and unyielding fidelity to the Constitution.”⁶³⁸ Numerous Democratic papers portrayed Woodward as a humble candidate who had not sought the nomination. Going into the convention in June, Clymer, Witte, George Sanderson and Major General William Franklin were considered the principal candidates.⁶³⁹ Once made the party’s nominee, the *Junitia Democrat* urged all favorable to state rights and constitutional liberty over despotism and tyranny to rally around Lowrie and Woodward.⁶⁴⁰ There was little doubt whom Democrats saw as the most trustworthy strict construction constitutional conservative on the court. Privately and publicly, Woodward made that commitment clear.

In a letter to Lewis S. Coryell weeks before accepting the nomination, Woodward commented that the Civil War represented a threat to state rights by replacing a government of “constitution loving citizens whose hearts were large enough to embrace the whole country” with one that showed “centralized despotism would be the death of popular liberty.”⁶⁴¹ The framers were the “constitution loving citizens” whose “heads were clear enough to see that a centralized despotism would be the death of popular liberty.”⁶⁴² If nominated, Woodward, promised he

⁶³⁸ *Ibid.*; “The Democratic Press of the State on the Nominations,” *Harrisburg Daily Patriot and Union*, June 23, 1863, 1. The *Armstrong Democrat* noted Woodward stood upon the same platform as Seymour. *Ibid.* The *Johnstown Democrat* agreed that Woodward was an ardent patriot with a “high cultivated intellect,” a “calm, unprejudiced philosophic mind,” and a candidate who would embody the “conservative, Constitution loving party.” “The Two Candidates,” *Johnstown Democrat*, September 16, 1863, 2.

⁶³⁹ “Spirit of the State Press,” *Harrisburg Daily Patriot and Union*, June 15, 1863, 1.

⁶⁴⁰ “The Democratic Press of the State on the Nominations,” *Harrisburg Daily Patriot and Union*, June 29, 1863, 1. The *Democratic Watch* wrote that Woodward should gain the support of any man who believed the state was “an independent sovereignty” and who was unwilling to sacrifice state independence to “gratify a Federal despotism.” “Who Will Vote for George W. Woodward,” *Democratic Watchman*, September 18, 1863, 1; *Democratic Watchman*, September 4, 1863, 2.

⁶⁴¹ Arnold Shankman, “For the Union As It Was and the Constitution As It Is: A Copperhead Views the Civil War,” in *Rank and File: Civil War Essays in Honor of Bell Irvin Wiley*, ed. James I. Robertson & Richard M. McMurry (San Rafael: Presidio Press, 1976), 101.

⁶⁴² White, “Civil War Letters of George W. Woodward,” 216-17.

would “stand by the few state rights that are left” and do his best to “administer the Constitution and laws as they are written.”⁶⁴³ To him, the Democratic nominee could not surrender states’ rights to any usurper.”⁶⁴⁴ Democrats, Woodward believed, should be defined by constitutional conservatism and strong defense of antebellum federalism.

Woodward stood out as a constitutional conservative not only in his political campaign for governor, but through his commitment to strict construction in his jurisprudence on the Pennsylvania Supreme Court. Justice Woodward’s most notable prior decision during the Civil War was the 1862 case of *Chase v. Miller*.⁶⁴⁵ Known as the “soldiers’ vote” case, the Pennsylvania Supreme Court decision required soldiers to vote in their *own precincts*, finding judges could not alter this constitutional language.⁶⁴⁶ Democrats in Luzerne County, after losing several officers due to the soldier vote, began to investigate stories of fraud and choose the party candidate for district attorney, Ezra Chase, to test the constitutionality of the law with George Wharton representing him.⁶⁴⁷ Democrats defended Woodward’s decision during the 1863 campaign as having the supporting of Republican judges Allison, Strong, and Read.⁶⁴⁸ More important was how Woodward’s decision reflected his consistent judicial approach. In *Chase*, Woodward wrote that he believed constitutions, above other documents, needed to be “read as they are written” and “judicial glosses and refinements are misplaced when laid upon them” since a construction “that opposes itself to both the letter and the spirit of the instrument” harmed

⁶⁴³ Shankman, “For the Union”, at 101.

⁶⁴⁴ White, “Civil War Letters of George W. Woodward,” 216.

⁶⁴⁵ *Chase v. Miller*, 41 Pa. 403 (1862).

⁶⁴⁶ *Ibid.*, 409, 412.

⁶⁴⁷ Republicans made a similar effort in Philadelphia, where the soldier votes kept Robert Ewing, the Democratic candidate for sheriff, in office. Arnold Michael Shankman, “Conflict in the Old Keystone: Antiwar Sentiment in Pennsylvania, 1860-1865” (PhD Diss., Emory University 1972), 105. Shankman claims that both Lowrie and Woodward wrote the opinion of the court, but the reporter states that Woodward himself did so.

⁶⁴⁸ “Political: From the Address of the Democratic State Central Committee,” *Philadelphia Inquirer*, Oct. 10, 1863.

both the fundamental political right of voting and acted against the fidelity of the oath to the constitution.⁶⁴⁹ Indicative of his constitutional conservative strict constructionism, Woodward commonly referred to the “natural reading” of instruments often in his opinions throughout the 1863 term. For instance, in an estate law case, *Directors of the Poor v. Royer*, Woodward’s opinion referred to both following the “strict application of legal principles” and “well-defined principles of law” in the case and called the result one of “substantial justice” in not forcing the directors to pay for the land again.⁶⁵⁰ More significantly, in a series of cases early in the term dealing with the “Stay Law” of 1861, Woodward’s strict constructionism was consistent in cases arising out of the war.

In the early 1863 case of *Clark v. Martin*, the defendant soldier sought such relief under Pennsylvania law and the “Stay Law,” claiming that no civil process could be issued or enforced against him because he was still “in the service” of the United States.⁶⁵¹ Woodward understood that the constitutionality of the stay law of 1861 was “supported solely on the ground that the utmost stay it could give to the defendants was for a period of time that was definite and reasonable.”⁶⁵² He was unwilling to apply the 1861 law to the case because according to settled doctrine, the legislature did not have the constitutional power to suspend the civil remedies of a citizen for an unascertained and uncertain period.⁶⁵³ In a related case, *Breitenbach v. Buch*, Woodward declared the “Stay Law” constitutional under the premise that stay laws, exemption laws and

⁶⁴⁹ Chase v. Miller, 41 Pa. 428.

⁶⁵⁰ *Directors of the Poor v. Royer*, 43 Pa. 146, 153-155 (Pa. 1863) (the first case ever in Pennsylvania of a widow trying to recover dower in land after a judicial sale for the payment of her deceased husband’s debts, the court struck down the dower).

⁶⁵¹ *Clark v. Martin*, 3 Grant 393, 394 (Pa. 1863). The defendant agreed to be mustered into the service “during the war.” The term was thus “indefinite.” However, his muster was not under the act of Congress of July 22, 1861, which authorized the President to accept not more than five hundred thousand volunteers “for such time as he should direct, not exceeding three years nor less than six months.”

⁶⁵² *Ibid.*, 395.

⁶⁵³ *Ibid.*, 396.

limitation laws were ordinarily constitutional and that under Pennsylvania precedent, states could modify the remedy but not impair obligations of contracts.⁶⁵⁴ Any law was constitutional which gave a stay for a time that was “definite and not unreasonable, but unconstitutional if the stay be for an indefinite time, or for a time that is unreasonable, though definite.”⁶⁵⁵ The effect of the war on constitutional interpretation was not absolute for Woodward. The constitutional prohibition on the obligation of contracts remained in effect. Democratic supporters of Woodward during his campaign saw *Clark* as evidence of his independence and judicial ability, as he protected the property of soldiers during their terms of service against “loyal” creditors.⁶⁵⁶

In a sister ruling in February, *Coxe’s Ex’r v. Martin*, Woodward expressed a “strong desire” to give all soldiers the benefit of the stay law, but blamed Congress for “most unwisely” making the enlistment of some soldiers definite and others indefinite, “establishing thereby an invidious and embarrassing distinction” and making it thus “impossible to apply the act of 1861 alike to both classes.”⁶⁵⁷ Woodward could not presume the Court would sustain a legislative suspension of civil remedies for a period “so indefinite as during the war.” The exigencies of war could not freely and arbitrarily supersede the Constitution. Thus, Woodward ended his brief opinion by noting that the Civil War did not “suspend the constitutional rights of the citizen any more than those other calamities would do.”⁶⁵⁸ Yet, as he showed in *Breitenbach*, Woodward did

⁶⁵⁴ *Breitenbach v. Bush*. 44 Pa. 313, 318 (Pa. 1863) (“The legislature cannot impair the obligation of any contract, but a suspension of remedies for a definite and reasonable time does not transcend the legislative faculty, because it impairs not the obligation of the contract.”).

⁶⁵⁵ *Ibid.*, 318-319.

⁶⁵⁶ “Woodward and His Defamers: The Issue Made and Met,” *North Branch Democrat*, September 30, 1863, 2.

⁶⁵⁷ *Coxe’s Ex’r v. Martin*. 44 Pa. 322, 326 (Pa. 1863). Similarly, in *Clark*, Woodward tersely remonstrated Congress for forgetting that civil process was guaranteed to the citizen by a law “higher than the legislature” which could not be disregarded and it was only under the “pressure of such extraordinary events as have crowded into our history for the last two years, the Supreme Court went to the extremist verge of the Constitution to sustain the stay law for three years and thirty days from the date of enlistment.” *Clark v. Martin*, 3 Grant 394.

⁶⁵⁸ *Ibid.*, 396.

not wish his constitutional commitment to be confused for opposition to the war—so long as that war was to uphold the Union and the Constitution as it was. He felt no citizen could be “blamed for volunteering” based on an appeal as “strong as his love of country” and there was nothing unreasonable about battling for “supremacy of the Constitution and the integrity of the Union.”⁶⁵⁹ Yet if constitutional conservatives saw Woodward as a committed strict constructionist based on his record, Republicans were thoroughly unimpressed. They did not see a serious legal actor committed to a core judicial philosophy, but a disloyal political schemer. Yet, they missed what Woodward’s own behavior indicated. He tried to both maintain his position on the Pennsylvania Supreme Court while running for governor, an indication he valued his position as a judge more than any political position.⁶⁶⁰

Republican newspapers spent the 1863 campaign tarnishing Woodward’s reputation by reminding voters of his apparent sympathetic feelings towards the Confederacy. They reminded readers of Woodward’s public and private comments in late 1860 supporting slavery and blaming the north for secession.⁶⁶¹ Republicans believed Woodward had not changed. Reverend

⁶⁵⁹ Breitenbach v. Bush. 44 Pa. 319.

⁶⁶⁰ As discussed, the biography of Woodward written by his son focuses extensively on his failed nomination to the Supreme Court, gives some time to his years on the Pennsylvania’s court, but says nothing of his campaign for Governor.

⁶⁶¹ Arnold Shankman, 28-29. Singled out were a December 20 speech in which Woodward stated that “Negro slavery has been an incalculable blessing to us” and that Yankees should “reassert the rights of the slaveholders or prepared to give up our Constitution and Union.” In his letters to Black in November and December 1860, Woodward asserted that Lincoln and Seward were right that the sectional conflict was “irrepressible” and called abolition the “cherished dogma of northern theology” which had entered northern schools and literature and even the Democratic party was becoming “abolitionized.” He begged the southern states to wait and forbear longer before seceding even if they were rightly outraged by Lincoln’s election and northern legislation that threatened the Constitution and public tranquility, and that if this would not say secession, “let it come, much as I deplore it,” because the bonds of Union had already been broken. Therefore, he as a Northern man could not “in justice condemn the South” for secession. He advocated for President Buchanan’s strategy to moral suasion but not coercion to prevent secessions, saying that, “I wish Pennsylvania could go with them” if they could not be persuaded, since they had “benefited and blessed us in a thousand ways” and Northerners had been wrongdoers. George W. Woodward to Jeremiah S. Black, November 18, 1860, 203-08. Whether or not secession was a constitutional right or revolution, the country was to be “dismembered” and the Constitution destroyed, but Woodward saw this as the beginning because it was likely that the southern states would eventually secede and if coercion could be avoided, the cotton states would show that “independence and freedom from abolition rule was a free choice. Woodward to Black, November 24, 1860, 208-10. Woodward believed that secession would have

Edward Strong told the Philadelphia *Inquirer* that Woodward denounced in “very strong and decided terms” the unconstitutional abolition war.⁶⁶² Worse, George W. Hart claimed that Woodward never said “one word of sympathy” for the government or those sacrificing “their lives for its support,” a sentiment Hart found shocking from a member of the high judiciary of the state.⁶⁶³ Others agreed that Woodward showed sentiments towards secession both in private and in public speeches. Lemuel Todd, a Republican representative and major in the Pennsylvania Reserves, placed Woodward alongside the likes of the “traitor Vallandigham” and other disloyal Democrats like Charles Ingersoll. Todd testified that Woodward, in conversation with friend and War Democrat Congressman Hendrick B. Wright, apparently argued for the constitutionality of secession while denying the “power and authority of the general government to coerce a state into obedience to its obligations under the Constitution.”⁶⁶⁴ Woodward largely avoided public comments in response to these rumors, but he did write to Rufus E. Shapley, the Chairman of the Democratic Standing Committee of Cumberland County, that there was “not a word of truth in

happened in 1856 had John C. Fremont won election. Woodward to Black, November 28, 1860, 211-12. Finally, Woodward was clear that he believed Congress had no power to arm the President with power to make war on a state—war could not keep the Union together because a sovereign state could withdraw its consent with due notice. George W. Woodward to Jeremiah S. Black, December 10, 1860, 214. Still, Woodward also noted that he saw John C. Calhoun’s principles and the horror of Northern abolitionism as similar forces that would dissolve political and social bonds, a reality that he was saddened by, not celebratory of. *Ibid.*, 215-216. This does not prove Shankman’s contention that Woodward was an “admirer” of Calhoun, but it does show that Lincoln’s election “profoundly disturbed him” and made him believe it was inevitable the South would secede. Shankman, 61. However, the private correspondence does not show that Woodward’s only regret was that Pennsylvania could not join the seceding states—he also was saddened by the death of the Union and Constitution *as it was* that he valued so much and blamed the abolitionists such that he wish to disconnect his state from the dying Union as well.

⁶⁶² “Testimony of Mr. George W. Hart, of Philadelphia,” *Philadelphia Inquirer*, Oct. 21, 1863. 3.

⁶⁶³ “Testimony of Mr. George W. Hart, of Philadelphia,” *Philadelphia Inquirer*, Oct. 26, 1863.

⁶⁶⁴ “Testimony of Lemuel Todd, Esq., of Carlisle Pa.,” *Philadelphia Inquirer*, Oct. 26, 1863 (Todd also claimed that a “shocked” Judge Hall called Woodward a “far more dangerous man than Vallandigham” because he was a disciple of the “extreme Calhoun school of politics,” a clear reference to states’ rights constitutionalism). Similar remarks were made earlier by Nathaniel B. Browne, a former Philadelphia postmaster general and Union League officer who did not know Woodward personally, in a letter to Charles Biddle, Chairman of the Democratic State Central Committee. *Philadelphia Inquirer*, August 28, 1863 (“It would be difficult to find a better living representative of the principles of John C. Calhoun”); Daniel Curran, “Polk, Politics, and Patronage,” *Pennsylvania Magazine of History and Biography*, Vol. 121, No. 3 (Oct. 1997), 168; Shankman, “Conflict in the Old Keystone,” 173.

the story” and that he was “SO FAR FROM EVER AVOWING BELIEF IN SECESSION” that was always in favor of suppressing the rebellion, and that his life had been spent upholding the Constitution as “the framers framed it.”⁶⁶⁵ Woodward defended himself as a member of the loyal opposition, a committed constitutional conservative who never embraced secession.

Chief Justice Lowrie was also running for reelection of his judicial seat in 1863, but his race was far less politically salient. As modest as Woodward appeared to be on the political stage, Lowrie was practically invisible. Lowrie had been on the Court for twelve years, with his first term ending in December.⁶⁶⁶ He was remembered by his colleagues on the bench and at Western University of Pennsylvania, where he taught for eight years before his Supreme Court election, for his thorough historical and philosophical consideration of complicated questions. Notably, he was also known for avoiding active participation in politics, devoting himself to the law and literary pursuits, not for inciting crowds with fiery speeches.⁶⁶⁷

Instead, Lowrie endeared himself to constitutional conservatives with his decision-making on the bench.⁶⁶⁸ He was praised in February 1863 for his jury charge given in the *Jeffersonian* free speech case. In the case, the jury ruled in favor of the editor of a Democratic newspaper who had had his printing press confiscated by a United States Marshal under the First

⁶⁶⁵ “Letter from Judge Woodward-A New Calumny Nailed,” *Johnstown Democrat*, Oct. 7, 1863, 1.

⁶⁶⁶ Lowrie was born in Allegheny County in 1807, where he was appointed as an Associate Judge of the Allegheny County District Court in 1846 before his 1851 ascension to the Supreme Court. Frank Marshall Eastman, *Courts and Lawyers of Pennsylvania, a history: 1623-1923, Volume II* (New York: American Historical Society, Inc., 1922) 506. From 1843 to 1851, Western University of Pennsylvania opened the Walter Lowrie Law School until he was elected to the Pennsylvania Supreme Court, with Lowrie serving as the university’s first professor of law. Agnes Lynch Starrett, *Through One Hundred and Fifty Years: The University of Pittsburgh* (Pittsburgh: University of Pittsburgh Press, 1937) 126-27.

⁶⁶⁷ J.W.F. White, “The Judiciary of Allegheny County,” *The Pennsylvania Magazine of History and Biography*, Vol. 7, No. 2 (1883), 183.

⁶⁶⁸ Lowrie had also been part of a key decision in 1856 interpreting the Fugitive Slave Act. In *Passmore v. Williamson*, Lowrie appeared to agree that state courts could not, by writ of *habeas corpus*, review federal legislation or hold federal officers acting under federal acts. Lowrie’s constitutional conservative approach remains consistent in the case. In both *Passmore* and *Kneedler*, Lowrie treated the questions before him as difficult.

Confiscation Act in 1861.⁶⁶⁹ The case was brought by prominent Philadelphia Democrats William B. Reed and George W. Biddle.⁶⁷⁰ During the Congressional debates, Representative Charles J. Biddle quoted Lowrie's argument that the acts of the President and his subordinate provost marshals were "without right unless they are authorized by some article of the Constitution or laws made under it and consistent with it...he can make no law that can invest him or his subordinates with new authority."⁶⁷¹ The *Johnstown Democrat* saw it as proof Lowrie's ability to soar above the "prejudices of the hour" and that by his opinion, the Constitution remained strong and "no President could thrust it aside."⁶⁷² As Henry Ward's *Harrisburg Daily Patriot and Union* stated after his "unexpected" unanimous June nomination, Lowrie was nominated by acclamation, powerful evidence they said of the esteem with which he was held, in part due to the sound principles laid down in the *Jeffersonian* case.⁶⁷³ Constitutional conservatives continued to praise Lowrie's decision throughout the summer.⁶⁷⁴

Besides this *Jeffersonian* case, Lowrie's most significant pre-*Kneedler* case came mere weeks before the *Kneedler* oral argument in September. In *Commonwealth v. Wright*, Lowrie

⁶⁶⁹ When it was appealed by the marshal to the United States Circuit Court for the Eastern District of Pennsylvania, a federal jury awarded the editor \$504. Republican Justice William Strong in April would uphold removal of the case to the United States Circuit Court under the removal provision of the Indemnity Act. It was ultimately dismissed in 1864 by Supreme Court Justice Robert Grier riding circuit.

⁶⁷⁰ Biddle was a plaintiffs' attorney in the *Kneedler* case, as discussed in Chapter Six.

⁶⁷¹ *C.G.*, 1215.

⁶⁷² "Chief Justice Lowrie," *Johnstown Democrat*, August 12, 1863, 1. (Lowrie "never swerved" despite the pressure to ignore "such outrages" in the course of prosecuting the war. Lowrie's jury charge "placed the first obstacle in the way of Federal despotism" with "one firm, earnest, Constitution-loving charge.")

⁶⁷³ "A Riot Wanted," *Franklin Repository*, August 19, 1863, 4; "The Democratic Press of the State on the Nominations," *Harrisburg Daily Patriot and Union*, June 23, 1863, 1. Pennsylvania constitutional conservatives supported Lowrie's June nomination for reelection, calling him "irreproachable" and a "consummate jurist" who the party conceded long before the convention was due his re-nomination. "Nominees of the Democratic Convention," *Harrisburg Daily Patriot and Union*, July 7, 1863, 1.

⁶⁷⁴ In an unnamed address from the Democratic State Central Committee of Pennsylvania in late August, Chief Justice Lowrie was lauded for adhering to the "ancient principles of English and American justice" in the *Jeffersonian* case. "Extract from the Address of the Democratic State Central Committee of Pennsylvania," *Cincinnati Daily Enquirer*, August 20, 1863, 1.

upheld the authority of state courts to maintain challenges to federal law by writ of *habeas corpus*. Pennsylvania judges were split on the question, with Judge Linn of the Eastern District ruling *Ableman* precluded state court jurisdiction while Schuylkill County Judge James Ryon found *Ableman* did not affect their ability to hear *habeas* cases.⁶⁷⁵ Lowrie followed Ryon and concluded that *Ableman* was a narrow decision which did not affect the general jurisdiction of state courts to review the imprisonment of state citizens by federal officers.⁶⁷⁶

Lowrie cautioned that state judges in “deciding upon a federal law, ought to be extremely watchful that no state or local opinions, prejudices, or excitements should so influence his judgment as to cause him to misinterpret or misapply a federal law.”⁶⁷⁷ To him, Pennsylvania history and jurisprudence weighed against the denial of state court jurisdiction, particularly for reviewing enlistments and arrests by federal marshals. Lowrie had no doubt that the state court records in Pittsburgh would show hundreds of such cases, including two tried by him.⁶⁷⁸ The Supreme Court retained a right of review to ensure state judges did not engage in arbitrary

⁶⁷⁵ *Shirk’s Case*, 3 Grant 460 (Pa. 1863). (Linn held that state courts clearly had the power to discharge, on *habeas corpus*, minors held to service under invalid contracts of enlistment. *Ibid* at 461. When the case was nothing more than an application for discharge from military service on the ground of minority status, state courts should similarly act properly to liberate the prisoner. However, when the prisoner was held under the authority of the United States and the defendant contested jurisdiction, state courts had no jurisdiction.); *Commonwealth ex. Rel. Bressler v. Gane*, 3 Grant 447 (Pa. 1863). Ryon boldly claimed that the right to proceed to declare Congressional acts unconstitutional or pronounce a judicial act of a federal court void for want of jurisdiction had been denied by some federal courts, but the denial did not appear “to be supported by satisfactory reasons or authority.” *Ibid* at 455

⁶⁷⁶ *Commonwealth ex rel. M’Lain v. Wright*, 3 Grant 437, 440-441 (Pa. 1863). Lowrie was aware of the Michigan Supreme Court’s decision in *Spangler* and like Justice Leonard in New York, felt the *Spangler* judges failed to understand that all *Ableman* stood for was that a prisoner cannot be taken out of the custody of the federal judiciary by means of a writ of *habeas corpus* issued by a state court. Under his own opinion in *Passmore Williamson*, an 1856 Pennsylvania Supreme Court case, Lowrie argued *habeas* was a pre-Constitution institution properly within the power of state judges which required the judiciary to often interfere with and set aside the acts of the highest officers of the government.

⁶⁷⁷ *Ibid.*, 443. Although Lowrie’s published decision does not comment on the act, Arnold Shankman claims that the case also strongly suggesting that the national government did not have the constitutional authority to enact a draft law. Arnold Shankman, *The Pennsylvania Antiwar Movement*, (Rutherford: The Fairleigh Dickinson University Press, 1980), 151.

⁶⁷⁸ *Commonwealth v. Wright*, 3 Grant 443-44. Lowrie noted that it had “always been regarded as law, that state judges may, by *habeas corpus*, try the validity of enlistments in the federal army and in the volunteers, when called out by federal authority, as well as other cases of claims to liberty.”

decision-making. Yet, he felt the government's argument was evidence of distrust of the state courts while under the pressure of civil war.⁶⁷⁹ Significantly, Lowrie handed down his decision in *Wright* knowing *Kneedler* would soon be argued and decided. *Wright* made it possible for the court to make a binding decision regarding the special injunction in *Kneedler* as it held state courts had concurrent jurisdiction to discharge persons restrained by federal authority under the Conscription Act.

Lowrie's race for reelection drew nothing like the level of partisan invective that George Woodward's run for Governor did, but he was still accused of disloyalty by the Republican press. Republican papers, for instance, ran stories that Lowrie had refused to feed or give money to two soldiers on July 4th, ordering them to leave because he would "prefer giving bread to rebel, rather than Union soldiers."⁶⁸⁰ Republicans painted Lowrie's position as a judge unimportant, as he appeared to them first and foremost as a politician and southern sympathizer hostile to the measures adopted by the Government.⁶⁸¹

Come October, both Woodward and Lowrie found themselves on the losing end of their respective political contests. Woodward lost by a margin of 15,000 votes, with Daniel Agnew winning Lowrie's seat by a "smaller majority."⁶⁸² When Woodward narrowly lost the race with Curtin in October, he was reported to say that he would not allow the defeat to "prey

⁶⁷⁹ *Ibid.*, 444-45. "I say it with great respect, I cannot avoid thinking that, in the light of all our previous practice, this objection indicates an undue suspicion of the state courts. I know that, in the trying circumstances in which the Federal government is placed by the present rebellion, it is entitled within the Constitution and law, to the generous sympathy of all American citizens, and that all its measures ought to be liberally interpreted, and not narrowly criticized. But, on the other hand, we can have no government unless there be mutual trust between the government and the people, and between the federal and the state government."

⁶⁸⁰ "Judge Lowrie's Heartlessness and Disloyalty," *Harrisburg Evening Telegraph*, September 24, 1863, 1. In another example, the *Evening Telegraph* separately attacked Lowrie for showing no sympathy for poor citizens by siding with the wealthy in the "Sunday law" concerning allowing cars to run on Sundays. "Judge Lowrie on the Necessities of the Poor Man and the Rich Man," *Harrisburg Evening Telegraph*, September 12, 1863, 1.

⁶⁸¹ "Hon. Walter H. Lowrie," *Harrisburg Evening Telegraph*, Oct. 9, 1863, 2.

⁶⁸² *Lebanon Advertiser*, Oct. 21, 1863, 2.

upon his health or spirit” and felt he was “better satisfied to remain upon the Supreme Bench,” hoping the “great principles of which he accounted himself but the representative, might triumph.”⁶⁸³ Yet, Woodward also dejected enough over the election that he prepared to move back home from Philadelphia to Wilkes-Barre and left his church for their pro-administration stance.⁶⁸⁴ Republicans even theorized in August that Woodward not only wished to stay on the Court, but wished to do so by leaving the gubernatorial campaign he was “heartily sick” of.⁶⁸⁵ Whether or not their hearts were in politics, the races both exposed Lowrie’s and Woodward’s constitutional bonafides to constitutional conservatives while opening them to attack by Republican critics as disloyal pro-Southern Democrats. The public constitutional debate influenced political campaigns like the 1863 Pennsylvania gubernatorial contest, which treated constitutional positions as politically germane. But battles were fought more frequently in the press, where Democratic and Republican newspapers could inculcate readers to the significance and righteousness of their constitutional arguments.

The Lawsuit

On July 30th, 1863, William Francis Nickels, a twenty-four-year-old resident of the third ward of Philadelphia submitted a bill against the local provost marshal William E. Lehman and members of the Board of Enrollment Charles Murphy, H.H. Marselis and Ebenezer Scanlan. He alleged his rights had been violated and his personal liberty was about to “be invaded by the said defendants under pretense of executing the laws of the United States.”⁶⁸⁶ The alleged injury was

⁶⁸³ *Ibid.*

⁶⁸⁴ Shankman, “Conflict in the Keystone,” 194 Shankman also mentions Woodward’s push to sue Bishop Alonzo Potter for

⁶⁸⁵ “Woodward Urged to Withdraw,” *Evening Telegraph*, August 12, 1863, 2. Reportedly, Woodward wished to withdraw from the contest, a move “bitterly opposed” by Witte, Clymer, and Hughes who helped make him the candidate. Their “informant” declared internal strife within the Pennsylvania Democrats.

⁶⁸⁶ Lehman had voted for the Conscription Act in February as a member of Congress and a War Democrat but was not reelected; “To the Judges of the Supreme Court for the Eastern District of Pennsylvania, Sitting in Equity” (unpublished material, Reproduction of Original Record, Pennsylvania State Archives, July 30, 1863).

the draft notice he received from the Board of Enrollment. Nickels had received notice from the board not from said military authorities that he had been drafted, as he waited in “daily expectation” of receiving said notice of being required immediately to report for duty “on pain of being regarded as a deserter from military service and of punishment by death for desertion under the articles of war.” Bills simultaneously filed by Henry Kneedler and Francis B. Smith attested to the same arguments.⁶⁸⁷ The bills were submitted to the Judges of the Supreme Court for the Eastern District of Pennsylvania sitting in equity and done explicitly to test the constitutionality of the Conscription Act.⁶⁸⁸ They asked for a special injunction to cover any citizens of the Commonwealth. Their arguments followed the arguments made by constitutional conservatives in the public constitutional debates, centering on questions of federalism foremost, along with separation of powers and personal liberties concerns.

The plaintiffs principally focused on the core federalism-based arguments of constitutional conservatives. They first had to establish that they were in fact drafted to show injury. For instance, Nickels argued that he was drafted into military service under the Conscription Act “without his consent and contrary to his will in derogation of the reserved rights of the state and of the liberties and rights of the citizens thereof and that the same is unconstitutional and void” as the “federal government had no power to enact such a law.”⁶⁸⁹ The plaintiffs reasoned that although the act was titled “An Act for Enrolling and Calling out the national forces” and claimed its authority from Congress’ Article I powers, the authority

⁶⁸⁷ Kneedler filled his bill against David Lane, the Provost Marshal who had given him notice of being drafted. This explains why once docketed and decided, the case was reported as *Kneedler v. Lane*.

⁶⁸⁸ “Unconstitutionality of the Conscription Act,” *Reading Gazette and Democrat*, Nov. 14, 1863, 2. Although not a subject for this dissertation, the fact that the suit was in equity is legally curious. An ongoing point of contention between the judges was whether or not the case was properly an equity suit and even if it was, whether or not the Court could grant relief. That is, the question remained whether or not relief was limited to a temporary injunction to protect the three plaintiffs or if the state court could issue a statewide injunction to protect *all* citizens from the Conscription Act.

⁶⁸⁹ *Ibid.*

exercised was “not in fact derivable from the powers by the Constitution given to Congress over the militia of the States.” Following the emphasis on constitutional tradition by other constitutional conservatives, they maintained that the Conscription Act was contrary to the manner of calling forth the militia “ever since the foundation of the Government” as shown by the Militia Acts of 1792, 1795, 1812, and 1862. Combined with the “judgments of the Courts of the United states and of the several states and the opinions of eminent judicial characters” in Congress, all united in the conclusion that the federal government held a “qualified and restricted power over the militia.” This restricted federal power left with the states and the people thereof all authority not so parted with in the Constitution. Thus, the Constitution gave Congress “no power over the militia” as attempted by the Conscription Act.⁶⁹⁰

Plaintiffs argued that antebellum federalism limited Congress’s power to “raise and support armies.” The attempted use of this power under the Conscription Act was “inconsistent” with not only the meaning of the Constitution and constitutional tradition but the “communal principles of liberty” in a free country.⁶⁹¹ The power to raise armies was limited to free male citizens and was similar to that to collect taxes or regulate commerce or provide for the calling forth of the militia. The power could not be exercised in a manner “which does not harmonize with the whole” of the Constitution’s structure. Thus, the plaintiffs found the Conscription Act was neither within the power to raise armies nor within the power to call forth the militia to execute the laws of the Union and suppress insurrection.⁶⁹²

The plaintiffs otherwise attacked the Conscription Act for its infraction upon separation of powers, its embrace of arbitrary power in the hands of federal officials, and its essential

⁶⁹⁰ *Ibid.*, 8.

⁶⁹¹ *Ibid.*, 9.

⁶⁹² *Ibid.*

unfairness. Their bill emphasized the breadth of the act which covered all male citizens ages twenty to forty-five including immigrants who had taken an oath to become citizens as part of the national forces of the United States “liable to perform compulsory military duty when thereto designated in the manner prescribed by the said act.” The plaintiffs’ complained that the act divided the United States into military districts with a provost marshal appointed by the President and a Board on Enrollment.⁶⁹³ Thus, included the plaintiffs’ interrogatories or questions before the court was whether they were in fact enrolled by the Board of Enrollment for military services.

The plaintiffs stipulated that the act of the Board of Enrollment had already begun to enroll and report to the board on July 20th many if not *all* of the persons of the sub-district subject to compulsory military service and plaintiffs believed they had been drafted.⁶⁹⁴ Notice itself of being drafted put citizens on the footing of enlisted soldiers in the United States army subject to the articles of war. Further, the plaintiffs suggested that enrollment officers were essentially granted arbitrary power, such that citizens were “universally concerned” with the accuracy of the lists prepared for the draft and “above all in its fullness and completeness but on the contrary every precaution is omitted against carefulness or willful misconduct of the enrolling officers.”⁶⁹⁵

⁶⁹³ Once drafted, citizens had ten days to give notice that they had been drafted and to rendezvous for duty, making them punishable as deserters should they fail to report for duty or furnish substitutes or pay a commutation fee for such service under the act.

⁶⁹⁴ Plaintiffs also claimed that fifty percent more than the President may have demanded by requisition were commanded by the act to appear for duty, an attack upon Section XII of the Act. (“And be it further enacted, That whenever it may be necessary to call out the national forces for military service, the President is hereby authorized to assign to each district, the number of men to be furnished by said district; and thereupon the Enrolling Board shall, under the direction of the President, make a draft of the required number, and fifty per cent, in addition, and shall make an exact and complete roll of the names of the persons so drawn....” Congressional Record, 37th Cong. 3d. Sess. Ch. 74, 75)

⁶⁹⁵ “To the Judges of the Supreme Court of Pennsylvania,” 9.

The *Kneedler* plaintiffs were concerned with arbitrary enforcement and unlimited administrative power as well as the unconstitutional underlying principle of national conscription. Thus, the bill also embraced perhaps the most widespread objection to the act—that the exemptions for those paying \$300 for a substitute were unfair and unequal. They argued that the section of the act allowing for paid exemptions meant that there was “an easy escape to all other persons” which violated the Constitution’s equal distribution of rights to all. The Constitution did not “prefer one class of citizens over another.”⁶⁹⁶ The substitution clause showed the Conscription Act was “against common justice” without a “reasonable degree of fairness in preparing the lists” from which the drafts were made. The argument concluded with a prayer for an injunction against the defendants to restrain them proceeding under the Conscription Act as to all citizens of Pennsylvania, thus demanding a statewide injunction.

Once filed, the case was delayed as Woodward awaited a hearing before the full Pennsylvania Supreme Court, as the court was out of session in August. Initially, the summons issued to the members of the board through Chief Justice Lowrie’s clerk commanded their appearance before the Eastern District in Philadelphia on the first Monday in September.⁶⁹⁷ The case was assigned to Woodward, with the bill filed August 29 under the case of Francis B. Smith v. Lane, Barrett, Wells and Young. On August 31, Woodward ordered argument for September 10th in Philadelphia. Plaintiffs’ counsel was ordered to give notice to the respondents and the other judges.⁶⁹⁸ Days later, Woodward pushed back hearing the case due to Chief Justice Lowrie’s inability to be present and then delayed further on the 9th due to Judge Thompson’s

⁶⁹⁶ *Ibid.*, 10.

⁶⁹⁷ Nickels v. Schuman et al, Subpoena in Equity. (unpublished material, Reproduction of Original Record, PA State Archives, July 30, 1863).

⁶⁹⁸ Smith v. Lane, Order Appointing Time for Holding Court (unpublished material, Reproduction of Original Record, PA State Archives, August 31, 1863).

other engagements. Woodward ordered adjournment of the hearing until the 23rd.⁶⁹⁹ Woodward had twice pushed back the hearing to ensure the whole court, including his Democratic colleagues, could participate. This matter of weeks ultimately meant the case would not be decided until after the October elections, which proved a fateful decision.⁷⁰⁰ On September 23, arguments were heard by the full court.⁷⁰¹ Not only would the government attorneys fail to appear, but George Wharton, arguing for the plaintiffs, would introduce new arguments before the Court to convince the judges both of its unconstitutionality and its illiberal character.

The morning of the 23rd, as Chief Justice Lowrie opened the proceedings, Ingersoll, Biddle, Wharton, and McCall appeared for the plaintiffs, but the United States did not appear to be represented. Biddle informed the court he believed Coffey and Knox would appear for the United States, as they had the paper books requested and Coffey had given his intent and desire to be present. Momentarily disorganized, the court requested proof that notice had been given to Coffey by Ingersoll and dispatched a messenger to find Coffey and Knox, who informed the court they were out of town.⁷⁰² Because the government did not appear, the plaintiffs were limited to argument from two of their attorneys, George Wharton and Charles Ingersoll. Wharton's argument took center stage, as the *Philadelphia Press* reported that Ingersoll only mirrored Wharton's comprehensive argument.

⁶⁹⁹ Kneeder v. Lane, Smith v. Lane, Nickels v. Lehman, Proof of Service of Notice of Adjournment to September 18th and service thereof also notice of adjournment to September 23rd service thereof, (unpublished material, Reproduction of Original Record, PA State Archives, September 4, 1863).

⁷⁰⁰ Woodward's decision was likely due to a combination of institutional and political considerations, but the evidence does not make a clear case. His exchange with Buchanan suggested that Woodward did not want to act improperly, and he may have willingly delayed the case past the elections to further inoculate the proceedings from claims that the court was acting politically. On the other hand, Woodward still left time for a decision regardless of the election outcome, which his critics seized upon, and he may have delayed in order to ensure votes against the Conscription Act heard the case.

⁷⁰¹ "News," *Philadelphia Press*, September 24, 1863, 2.

⁷⁰² "Legal Intelligence," *Philadelphia Press*, September 23, 1863, 4.

Wharton's argument showed that after months of public constitutional debate, constitutional conservatives were confident they had discovered the most potent arguments against the draft. He used the argument to expand on the core federalism-based objections found in Nickels' bill. Wharton attacked the Conscription Act as allowing the government to compulsorily take at its pleasure the entire male population or an "arbitrarily-designated portion" against their will, ignoring that state reserved powers by treating the "necessary and proper" clause an independent grant of power. He reminded the court that before the Conscription Act, no statute had been passed by Congress enforcing military service and thus the act was a historic novelty. It was therefore also a case of first impression as to the constitutionality of conscription.⁷⁰³

Wharton ran down the implications of the Conscription Acts' expansion of federal power. If Congress could conscript every male citizen, the reserved powers of the states could not be preserved, and state forces would be absorbed by the federal army. Wharton also turned to arguments not made in the submitted briefs to show how the Conscription Act infringed upon federalism. Wharton argued that the Second Amendment's protection of well-regulated militias as necessary to the security of a free state ensured a militia system that relied upon able-bodied citizens to render military service in emergencies for defensive warfare. He said this was why the provisions of Article I granted Congress power over the militia while affirming the existence of the militia as a body distinct from the United States armies. Wharton warned the court that under the Conscription Act, when the President called out the national forces, the whole military force of the country became a federal force subject to his orders and ceased to be militia.

⁷⁰³ *Ibid.*

Throwing the kitchen sink at the court, Wharton even argued that the act burdened the Fourth Amendment right against unreasonable searches and seizures, since the act subverted personal liberty in service of military duty.⁷⁰⁴ Wharton also made a clever argument attacking the exemption or pecuniary clause. He claimed it was illegal because it was unequal in its operation by compelling those into service who were unable to pay the exemption money. This was “unjustly oppressive” on the poor. Further, the exemption money was not a voluntary payment, a fine, or a penalty, but a tax. Taxes had to conform to the rule of uniformity and the rule of apportionment. Wharton was convinced the exemption money under the Conscription Act was a direct tax that had to follow the rule of apportionment and did not. The money raised under the draft was to be expended for procuring substitutes through bounties.

Wharton ended his argument by addressing the appropriate remedy in the case and the applicability of *Ableman v. Booth*, another issue unaddressed by the July complaint. He understood that under the Pennsylvania Judiciary Act of 1836, the Pennsylvania Supreme Court had to prevent or restrain the commission or continuance of acts contrary to law and prejudicial to the interests of the community or individual rights. Wharton believed *Ableman* was not controlling in this case because there was no interference of jurisdiction between the state and federal courts nor a pending case in federal court. The plaintiffs asked for an injunction not against any process of a federal court, but against executive officers carrying out provisions under a federal act. State sovereignty could not act outside of its own jurisdiction, but nothing in the Constitution gave federal courts exclusive power to decide constitutional questions, since to do so would grant the federal government the ability to interfere with state sovereignty. Further, the Supreme Court maintained the ultimate right of decision upon appeal from the highest state

⁷⁰⁴ *Ibid.*

tribunals under the Judiciary Act of 1789 and Wharton informed the court that plaintiffs did not contend that there could not be an appeal should the judges rule the act unconstitutional.⁷⁰⁵ It was a reminder that ultimately, constitutional conservatives hoped the Supreme Court would take such an appeal in order to render a final judgment against the Conscription Act.

The oral argument captured the interest of elite commentators and constitutional conservatives. It was reported in the *Pittsburgh Gazette* that there were administration allies in attendance in the courtroom and questions about whether there were prejudices in the minds of the court against the Conscription Act. There was a “large sprinkling” of lawyers of the bar gathered and there was a “small gathering of Democratic politicians” who were “personally interested in the questions before the court.” However, the *Gazette* cautioned that “beyond this there was nothing to suggest that any political question being discussed” or was under consideration. The report confirmed that United States District Attorney George Alexander Coffey and John Colvin Knox had “extended to take part in the argument” and had been “furnished with the paper books of the case before not appearing on the 23rd.”⁷⁰⁶ Indeed, in the lead up to the hearing, George Biddle had given proper notice to United States Special Counsel Knox and Coffey.⁷⁰⁷ In fact, Coffey and Knox had been ordered by the Court’s Chief Clerk to appear on the 23rd, after noting that Wharton had furnished the paper books Coffey requested the

⁷⁰⁵ The *Habeas Corpus Act* covered “suits or prosecutions, civil or criminal, for trespasses or wrongs done or committed, or any act omitted to be done by virtue or under color of any authority derived from, or exercised by, or under the President of the United States, or any act of Congress.” Wharton stated this was not the condition of the present case. Even if constitutional conservatives felt strongly the *Habeas Corpus Act* of 1863 was also unconstitutional, Wharton was clear that the plaintiffs made no arguments relating to it. There was no question as to the right of removal in these cases to a federal court and Wharton felt the act did not cover the plaintiffs’ case regardless.

⁷⁰⁶ “Constitutionality of the Conscription,” *Pittsburgh Gazette*, September 26, 1863. Knox was a former Attorney General and who had represented the United States in the United States District Court cases arising under the Conscription Act.

⁷⁰⁷ Frank Eastman, *Courts and Lawyers of Pennsylvania: 1623-1923, Vol. 2*, (New York: The American Historical Society, Inc., 1922) 507. Both participated in the *Antrim* and *Stingle* cases before Judge Cadwalader.

paper books and Coffey had been sent a written notice of the intended hearing.⁷⁰⁸ Knox requested an additional paper book which was furnished to him. Records confirm that Knox wrote to Charles Ingersoll on the 3rd both requesting the additional copy of the bill filed and confirming the initial date of argument, the 10th.⁷⁰⁹ The federal government had accepted to appear on the 23rd, but mysteriously reversed in the last hour. This likely followed from their strategy of avoidance.

Democratic papers suspected that Coffey refused to appear at the September 23rd argument based on instructions from Washington.⁷¹⁰ It was seen as part of a conspiracy by Lincoln to deliberately close the courts and not allow the legality of the Conscription Act or other major war measures to be tested judicially because “every intelligent man” knew them to be unconstitutional. The underlying reality was that the Lincoln Administration were deeply concerned about the court challenges and many administration members questioned the legitimacy of state court jurisdiction. Whether an order was given, there were reasons the Lincoln administration did not want to appear in Pennsylvania’s Supreme Court when they might lose. As it happened, the administration waited until the outcome of the October elections and for Lowrie to leave the bench upon losing his seat to make an appearance. Regardless of the government’s lack of appearance, the constitutional conservatives on the bench were familiar with the arguments against the Conscription Act.

⁷⁰⁸ No. 3, 5, & 7, Jan. Term 1864 Equity, *Kneedler v. Lane*, Affidavit of George M. Wharton to leave notice to Counsel, US. (unpublished material, Reproduction of Original Record, PA State Archives, September 23, 1863). In an affidavit, Wharton testified Coffey gave his intention to appear and argue the cases and had also sent written notice to Knox of the paper book and date of intended argument.

⁷⁰⁹ John B. Knox to Charles Ingersoll, Esq, September 3, 1863. (unpublished material, Reproduction of Original Record, PA State Archives).

⁷¹⁰ “One of the Great Remedies of the People Destroyed-The Courts Closed Up,” *Cincinnati Daily Enquirer*, September 30, 1863, 2. When Congress was debating changes to the Conscription Act in December, the *Johnstown Democrat* declared that Secretary of War Stanton knew the law was imperfect and impracticable and thus the administration “refused to appear in the junction case” of. “The Draft,” *Johnstown Democrat*, Dec. 23, 1863, 2.

The Opinions

When the Pennsylvania Supreme Court judges finally released their opinions in *Kneedler* on November 9th, constitutional conservatives hoped that the court would be sympathetic to their arguments. They were well-prepared by the year's public constitutional debate to understand the best arguments against the Conscription Act, yet it was not obvious which arguments they would focus on, especially given Wharton's expansive oral argument. The resulting three opinions of the majority all focused on the core federalism-based objections to national conscription. The key differences between the three were in Lowrie's reluctance to overturn the act, Woodward's emphasis on the inequality of the act's exemption clause, and Thompson's focus on the Second Amendment.

Lowrie's opinion opened by recognizing the challenges of the case. For him, the decision was difficult both because of the government's refusal to appear because it did not recognize the power the state courts to decide upon the constitutionality of federal acts and because the "great parties of the country have divided upon it."⁷¹¹ Lowrie's analysis of the Conscription Act began with familiar emphasis on preservation of antebellum federalism. As constitutional conservatives frequently observed, only the state militias and regular army were recognized both by the Constitution and constitutional history as proper military forces.⁷¹² Lowrie believed only under the power to raise armies could the act be founded, but the act's constitutionality ultimately turned on the "necessary and proper" clause. Thus, the case centered around the question of which the proper modes of were exercising the power of raising armies. Lowrie did not feel the existence of civil war made the Conscription Act a "necessary and proper" one because the inadequacy of the permanent and active forces of the government for rebellions was expressly

⁷¹¹ *Kneedler*, 45 Pa. 240-241; Shankman, *The Pennsylvania Antiwar Movement*, 152.

⁷¹² *Kneedler*, 45 Pa. 242.

provided for by the power to call forth the militia. Therefore, it was the only means allowed, something Lowrie felt the Ninth and Tenth Amendments confirmed.⁷¹³

Like other constitutional conservatives, Lowrie foresaw a “parade of horrors” that would threaten the Constitution’s integrity if the Conscription Act could stand as precedent.

Lowrie offered other reasons why the Conscription Act was not a “necessary and proper” way to raise armies, saying that:

“If Congress may institute the plan now under consideration, as a necessary and proper mode of exercising its power “to raise and support armies,” then it seems to me to follow with more force that it may take a similar mode in the exercise of other powers, and may compel people to lend it their money; take their houses for offices and courts; their ships and steamboats for the navy; their land for its fortresses...and their provisions and crops for the support of the army. If we give the latitudinarian interpretation, as to mode, which this act requires, I know not how to stop short of this. I am sure there is no present danger of such an extreme interpretation, and that even partisan morality would forbid it; but if the power be admitted we have no security against the relaxation of the morality that guides it, I am quite unable now to suppose that so great a power could have been intended to be granted, and yet to be left so loosely guarded.”⁷¹⁴

Lowrie argued that if the Conscription Act made national conscription the regular mode of raising armies, then it might disregard all considerations of age, occupation, and profession and end up taking “our governors, legislators, heads of state departments, judges, sheriffs, and all inferior officers, and all our clergy and public teachers, and leave the state entirely disorganized” because it would admit no binding rule of equality or proportion. But these results, Lowrie said, were structurally impossible under the Constitution. In all other matters involving forced contribution to the federal government imposed by the Constitution, such as duties, imposts, excises, direct taxes, and the organizing and training the militia, the rule of uniformity, equality, or proportion was fixed in the Constitution.⁷¹⁵ Beyond that, Lowrie stated if the founding fathers

⁷¹³ *Ibid.*, 242.

⁷¹⁴ *Ibid.*, 245-47.

⁷¹⁵ *Ibid.*, 243.

presumed that acts like the Conscription Act were possible, they would have regulated its exercise. They did not because no regulation was necessary if all recruits were to be obtained according to constitutional tradition by voluntary enlistments.⁷¹⁶ The mode of increasing the military force for the suppression of rebellion already lay in the Constitution such that every other mode was necessarily excluded.

As a constitutional conservative and strict constructionist, Lowrie was clear that all powers not delegated were reserved to the states.⁷¹⁷ Because the power to conscript was not expressly delegated, it could not be implied if it was incompatible with any power reserved to the states.⁷¹⁸ Lowrie ended his majority opinion by explaining his cautious jurisprudence with respect to overruling acts of Congress.⁷¹⁹ As he had in *Commonwealth v. Wright* he felt distressed that he was “forced into this conflict with an act of Congress of such very great importance in the present juncture of federal affairs” and noted that if it was an error, “it may yet produce a different result on the final hearing, which I trust will take place so soon that no public or private injury may arise from any misjudgment now and here.” Lowrie hedged his bets. He believed the Conscription Act was unconstitutional but was clear it was a difficult decision he expected could be revisited or reversed. And those concerns were hastened by his support of the war, exclaiming that “in this great struggle, we owe nothing to the rebels but war, until they submit.”⁷²⁰ The war was never far from the minds of justices considering these significant cases.

⁷¹⁶ *Ibid.*

⁷¹⁷ *Ibid.*, 243.

⁷¹⁸ *Ibid.*, 244. Lowrie stated that this was “not only the express rule of the Constitution, but it is necessarily so; for we can know the extent to which state functions were abated by the federal constitution only by the express or necessarily implied terms of the law or compact in which the abatement is provided for.”

⁷¹⁹ *Ibid.*, 250.

⁷²⁰ *Ibid.*

Much as Lowrie's majority opinion utilized arguments similar to those employed by constitutional conservatives in the public constitutional debates, Judge Woodward's opinion lacked the hesitation to declare an act of Congress unconstitutional. For Woodward, duty and reverence for the Constitution and the founding tradition demanded striking down the act. He dramatically began his concurrence by agreeing with the plaintiffs' argument that the \$300 exemption clause forced the burden of the draft on the poor. Woodward said that this objection only went to the spirit of the act and not to its constitutionality.⁷²¹ Thus, he set out to prove that the Conscription Act was both unconstitutional and despotic in character. Like Lowrie, Woodward principally focused on federalism-based arguments. As the plaintiffs' bill argued, Woodward agreed the term "national forces" in the Conscription Act was language not found in either state or federal constitutions. According to constitutional tradition, "national forces" applied to a standing army and therefore was "a total misnomer when applied to the militia."⁷²² Woodward felt that the Conscription Act clearly offended these constitutional traditions.

Like constitutional conservatives in Congress, Woodward was openly suspicious of Congress' motives, believing they must have intended to draft the state militias despite the use of the language "national forces." Thus, the relevant question was whether Congress held power to draft into the military service of the United States the militia men of Pennsylvania. Woodward believed the Constitution directly answered the question, because the framers and ratifiers of the Constitution gave to Congress all the powers that are either express or are essential to the execution of expressly delegated powers.⁷²³ Like Lowrie, Woodward was committed to strict

⁷²¹ *Kneedler*, 45 Pa. 253 (Woodward, J., concurring).

⁷²² *Ibid.* The militia was one that was "one of bulwarks of our liberties, as recognized in the federal constitution, and it is not in the power of Congress to obliterate them, or to merge them in 'national forces.'"

⁷²³ *Ibid.*, 254.

constructionism and historic originalism which protected the original federalism structure of the Constitution. Therefore, he understood “raising armies” to refer to the *mode* of raising, not to the size of the army. Woodward found that the framing generation derived their ideas of government principally from Great Britain and not from any of the more “imperial and despotic governments of the earth.”⁷²⁴ Woodward observed that the British army had generally been recruited by voluntary enlistments, stimulated by wages and bounties, since any attempted forced conscriptions was immediately met with disfavor. Therefore, he felt any power conferred on Congress was the power to raise armies by the ordinary English mode of voluntary enlistments. Constitutional tradition informed the extent of federal power and limited the modes Congress could properly use.

Giving these limitations, Woodward found that the Conscription Act improperly drafted men directly into the service of the United States army and did not call them out as militia.⁷²⁵ Woodward agreed with Lowrie that “necessary and proper” only referred to the ability to execute enumerated powers.⁷²⁶ He was clear that the primary constitutional issue was the Conscription Act’s attack upon antebellum federalism. The “great vice” of the Conscription Act was that it took away the “security and foundation” of a citizen’s state rights.⁷²⁷ Like Lowrie, Woodward

⁷²⁴ *Ibid*; This paralleled arguments made earlier in the summer by Democratic newspapers who used nearly the same language to spell out their constitutional objections. See “The Conscription”, *Democratic Watchman*, August 7, 1863, at 1 (quoting a Mr. Daggett, a Congressional Representative, that in Great Britain, a nation known for tyranny, such an oppressive measure was never successfully attempted and it is thus utterly inconsistent with the principles embedded into the Constitution at the framing). Arnold Shankman notes that the Watchman was the “most vociferous of the anti-war journals in 1861,” seeing the war as a conflict “designed to destroy state rights.” Shankman, “Conflict in the Old Keystone,” 96.

⁷²⁵ *Kneedler*, 45 Pa. 257 (Woodward, J., concurring). (Congress acted to draft them “in contempt of state authority” by not calling them out under state officers.)

⁷²⁶ *Ibid*.

⁷²⁷ *Ibid.*, 259.

agreed with other constitutional conservatives that the primary threat of conscription was to federalism.

Judge James Thompson wrote the last of the three concurring opinions in *Kneedler*. His concurrence found little of the same popularity amongst Pennsylvanian Democrats or outrage among Republicans, as Thompson had not be involved in a heavily contested election attached to the outcome of this case Yet, Thompson too held a long background in Pennsylvania Democratic politics, having been involved in Democratic politics since the 1830s.⁷²⁸ His concurrence followed Lowrie's and Woodward's in paralleling the existing constitutional conservative constitutional arguments emphasizing preservation of federalism and employment of strict constructionism.⁷²⁹ Beyond the core federalism-based arguments of constitutional conservatives, Thompson also felt the Second Amendment was evidence the framing generation were apprehensive about such a "dubious power" as the power of the federal government to coercively conscript.⁷³⁰ Plaintiffs' counsel had not made this argument in oral argument or in their complaint, but many constitutional conservatives like George Ticknor Curtis had broached in the public constitutional debate. Thompson saw the threat as dire, writing that the militia could not be destroyed by an act of Congress.⁷³¹ The Constitution forbade this by granting a positive injunction to provide for organizing, arming, and disciplining the militia meant to supply states security against the federal government. Thompson also felt the Conscription Act ignored the

⁷²⁸ Thompson had been a member of the Pennsylvania House in the 1830s who rose to speaker before his appointment as President Judge of Crawford, Warren and Venango Counties in 1836. Thompson would return to politics, serving in Congress from 1844 to 1850 as a Democrat before returning to the state house until he was elected an associate justice of the Supreme Court in 1857. Eastman, *Courts and Lawyers of Pennsylvania*, 507-8.

⁷²⁹ *Kneedler*, 45 Pa. 265 (Thompson, J., concurring);

⁷³⁰ J. Norman Heath, "Exposing the Second Amendment: Federal Preemption of State Militia Legislation," 79 *University of Detroit Mercy Law Review* 39 (2001), 54-55.

⁷³¹ *Kneedler*, 45 Pa. 270 (Thompson, J., concurring). For Thompson, the act "plainly and directly destroys the militia system of the states" through the text of the act mandating that every "able-bodied man in the United States, between twenty and forty-five" be enrolled to constitute the national forces.

Militia Acts of 1792 and 1795, because through its provisions the militias were to be enrolled as part of the national forces.⁷³² The act thus broke with key constitutional tradition regarding calling out the militia.

As Lowrie and Woodward similarly argued, the Conscription Act ignored the distinction between the militia and the regular army and improperly designated federal officers to command those enrolled in each state.⁷³³ Like Woodward, Thompson insisted the act was at odds with English precedent and historic originalism.⁷³⁴ He thought no one could be “credulous enough to believe that if a power had been supposed to exist” to raise an army by coercive means that it would have been ratified by the states.⁷³⁵ Like Lowrie, as a constitutional conservative, Thompson clearly recognized the stakes of the war and desired to witness “the suppression of this unjustifiable and monstrous rebellion” which must be “put down to save the Constitution and constitutional means for the purpose I believe to be ample; but we gain but little.....if we voluntarily impair other portions of it.”⁷³⁶ The reality of war weighed heavily on the minds of these three judges even in midst of courtroom battles over the constitutional viability of key Lincoln war measures. For constitutional conservatives like Lowrie and Thompson, the Constitution did not grant emergency powers and war did not alter the Constitution’s structure of federalism. The war needed to be won but not at the expense of the Constitution.

Still, despite the unity of the three majority opinions, the Pennsylvania Court’s decision in *Kneedler* was a close and divided one. Two justices dissented vigorously to defend the

⁷³² *Ibid.*

⁷³³ *Ibid.*, 270.

⁷³⁴ *Ibid.*, 266-273.

⁷³⁵ *Ibid.*, 267-268. To think otherwise, Thompson argued, would be “preposterous” and would suggest that the framers allowed a latent evil to lapse for three-quarters of a century.

⁷³⁶ *Ibid.*, 274.

Conscription Act based on the inherent powers of nations at war. Justices William Strong and John Read, like the majority, wrote opinions paralleled existing arguments made in the public constitutional debates.⁷³⁷ Strong emphasized the exigencies of the war and employed the argument of necessity. The requirements of fighting a civil war and protecting the existence of government itself made it apparent that conscription was constitutional. As Strong suggested, “the necessity of vesting in the federal government power to raise, support, and employ a military force, was plain to the framers of the constitution, as well as to the people of the states by whom it was ratified.” Such power was necessary for the common defense and to preserve the existence of any independent government, and none has ever existed without it.⁷³⁸ Strong recognized constitutional limits on the federal government’s power over the militia, but those were explicit limitations to calling out the militia only, not to *raising* armies.⁷³⁹ For him, Congress’ powers over the militia “must be held to mean what its framers, and the people who adopted it, intended it should mean” and that judges were not “at liberty to read it in any other sense” or insert “restrictions upon powers given in unlimited terms, any more than we can strike out restrictions imposed.”⁷⁴⁰ Strong employed a similar approach to the majority using historic originalism, but instead found that the Conscription Act was constitutional.

⁷³⁷ Strong was a former abolitionist Democratic member of the House who won his seat on the Court in 1857 as a Democrat. He changed parties and joined the Republicans after the war started because he was so strongly in favor of protecting the Union cause. Strong was later elevated to the United States Supreme Court in 1870, where he left his biggest mark by upholding the Federal Government’s power to issue legal tender. John Read was one of the founders of the Republican Party whose political career stretched back to 1822. Read was Attorney General of Pennsylvania before being nominated to the Supreme Court in 1845 following Woodward’s failed nomination. Read’s nomination failed as well, due to his strong anti-slavery record.

⁷³⁸ Kneeder, 45 Pa. 275(Strong J., dissenting).

⁷³⁹ *Ibid.*, 276. The only limited to the power to raise armies was that appropriations not go over two years. The power was otherwise “unrestricted” as to “the magnitude of the force which Congress is empowered to raise,” the mode used or the employment of the army.

⁷⁴⁰ *Ibid.*, 277.

Unlike the majority, Strong was clearly willing to accept the notion of implied powers. Strong's dissent relied upon an expansive understanding of the "necessary and proper" clause. For him, Marshall's opinion in *Gibbons v. Ogden* stood for the principle that all the powers vested by the Constitution in Congress were "complete in themselves, and may be exercised to their utmost extent," and the only restrictions upon them were those explicit in the Constitution. The power to raise armies was no different from the power to borrow money or to regulate commerce.⁷⁴¹ Strong also felt that Democratic critics and the plaintiffs ignored the precedent of *Houston v. Moore*, which "exploded" the objection that conscription was unconstitutional because the decision allowed a drafted man to be punishable as a deserter before he was mustered into service.⁷⁴² He saw constitutional conservatives as misunderstanding constitutional tradition and a proper reading of Article I powers.⁷⁴³ Employing their approach, Strong discovered what he thought was ample support for national conscription.

Because Justice Strong's opinion addressed Congress's constitutional powers under Article I, Justice Read narrowed his focus on addressing the state court's lack of proper jurisdiction. Read felt that the plaintiffs had clearly entered a suit in equity only because the writ of *habeas corpus* was suspended. This was improper and novel, not conscription. As Read said, "the present application is a substitute for the writ of habeas corpus" since the plaintiffs allege that "they have been drafted, and have received notice of the draft, and are placed on the footing of enlisted soldiers, and liable to be punished as deserters, should they fail to report for duty,

⁷⁴¹ *Ibid.*, 278.

⁷⁴² *Ibid.*, 281. Following from Judge Washington's opinion in *Houston v. Moore*, Congress could declare male citizens "in service from the time of the draft," which Strong thought was precisely what the Conscription Act did.

⁷⁴³ This apparent use of strict constructionism annoyed Democrats. The *Johnstown Democrat* attacked Judge Strong as a "renegade" to the Democratic party who took an oath to interpret the Constitution according to the Jacobin League's oath. The Democratic press clearly expected Strong to side with the majority, as no Jacobin leaguer would "dare" publish such an opinion. "Conscription Unconstitutional," *Johnstown Democrat*, Nov. 18, 1863, 2.

which they have done.”⁷⁴⁴ *Ableman v. Booth* directly answered the question of jurisdiction for Read, denying state court judges the power to issue writs against federal officers executing federal law.⁷⁴⁵ He did not accept as proper the constitutional conservative strategy to get around the denial by Lincoln’s proclamation of state court jurisdiction in *habeas* cases.

On the merits, Read, like Strong, was certain that precedent and constitutional tradition clearly granted Congress the power to conscript. He observed that other courts had already found the act clearly an exercise of constitutional power.⁷⁴⁶ Read cited Hamilton’s argument in *Federalist* 23 that must the power to raise armies must “exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies” and that “no constitutional shackles can wisely be imposed on the power to . . . provide for the defense and protection of the community in any manner essential to its efficacy.”⁷⁴⁷ For Read, Hamilton’s understanding was broadly accepted by the founding generation, as evidenced by General Knox’s 1790 plan to make all males 18 to 60 liable to service and Rhode Island’s 1790 recommendation of an amendment to allow that “no person shall be compelled to do military duty, otherwise than by voluntary enlistment, except in cases of general invasion.”⁷⁴⁸ He

⁷⁴⁴ Kneeder, 45 Pa. 293. (Read, J., dissenting)

⁷⁴⁵ See *Ableman v. Booth*, 62 U.S. 506 (1859).

⁷⁴⁶ Kneeder, 45 Pa. 289-90. *Washington Evening Star*, August 29, 1863, 2. (Referring to the case *In Re Dunn*, ordering the suspension and stay of all proceedings after noting that the order of September 15 suspending the writ was valid and “efficient in law” and by that force all authority and right in the state court to act further ended.) Read also pointed to Cadwalader’s *Antrim* opinion. Read had corresponded with and requested Cadwalader’s opinion personally, so he was well aware of Cadwalader’s arguments.

⁷⁴⁷ Kneeder, 45 Pa. 284-87. Experience with the Articles of Confederation proved to Read that the founding generation concluded “whatever means might be required to raise an army could be used by the Congress, and they were the sole judges of its expediency and propriety.”

⁷⁴⁸ *Ibid.* Democrats frequently looked to Rhode Island’s amendment as evidence of the tradition of all-volunteer national forces but Read saw it as evidence that Knox’s interpretation had won out because an amendment was required to limit the power of compulsion to general invasion.

believed that the Monroe plan during the War of 1812 only confirmed the expansive Hamiltonian understanding of the power to raise armies.⁷⁴⁹

Both Strong and Read agreed that the Constitution and historic originalism supported the power of the national government to conscription. For both the majority and dissenting in *Kneedler*, the public constitutional debates may have influenced their arguments. All the opinions in *Kneedler* ran parallel to the constitutional arguments already made in the public debate. Constitutional conservatives seemed to have won a majority victory and celebrated as such. But a shadow of growing uncertainty remained as they wondered how long it would last.

The Aftermath: Public and Political Reactions and Overturning the Injunction

The reaction of both the Republican and Democratic press overtly displayed the level of ongoing engagement on the part of elites involved in the public constitutional debate over conscription. Republicans saw the *Kneedler* decision as obviously a political decision meant to question the constitutionality of the entire war effort. The Democratic press celebrated the vindication of constitutional conservative arguments against the Conscription Act. The *Democratic Banner* were clear that the decision reflected what they and other constitutional conservatives had stated since the law was passed—the law violated the Constitution’s structure of federalism. This was their opinion from the beginning, and they did not “hesitate so to express it.” Either the “preposterous” law was unconstitutional or “all our ideas about state sovereignty, states’ rights” and Pennsylvania’s power to control its own militia were “grossly wrong.”⁷⁵⁰ The *Johnstown Democrat* wrote that the opinions of the majority were “unanswerable” because they were what “any person expected who had any regard for the Constitution” and the rights of

⁷⁴⁹ *Ibid.*, 288. It was not lost on him that Charles Ingersoll’s father, Charles Jared Ingersoll, had favored the constitutionality of the measure so similar to the March 3 Act.

⁷⁵⁰ “The Conscription Law Declared to be Unconstitutional,” *Democratic Banner*, Nov. 18, 1863, 2.

citizens would expect.⁷⁵¹ They proclaimed that they had “never heard of any lawyer” with “any respect for his professional reputation” that doubted the unconstitutionality of the Conscription Act given that the act obliterated the right of states to furnish their own militia. Similarly, the *North Branch Democrat* incredulously felt even a “mere schoolboy” could understand Woodward’s “clear exposition of the Constitutional mode of raising armies.”⁷⁵²

Democratic papers also remained frustrated by the government’s lack of appearance at the September 23rd hearing.⁷⁵³ Because of that decision, some Democrats expected the *Kneedler* decision would not be given its proper judicial effect. Harvey Sickles and the *North Branch Democrat* predicted that it was “more than probable” the decision, like the Constitution itself and the reserved rights of the states, would be treated as a nullity by Washington.⁷⁵⁴ Still, some Democratic papers felt it was more important to recognize that Pennsylvania’s highest judicial tribunal had pronounced the Conscription Act to be *no law* and that the decree was “binding upon the Executive as it is upon the humblest citizen.” As the plaintiffs demanded, they believed the decision created a statewide injunction halting the act. Thus, until it was before the Supreme Court or reversed by the state supreme court itself, any attempt to execute the Conscription Law in the state should and must be “resisted as any other unlawful attempt to interfere with the rights

⁷⁵¹ “Conscription Unconstitutional,” *Johnstown Democrat*, Nov. 18, 1863, 2.

⁷⁵² *North Branch Democrat*, Dec. 1, 1863, 1.

⁷⁵³ Republicans countered the Democratic complaint that the government failed to enter an appearance on September 23. They thought the government rightly denied state court jurisdiction because the only tribunals which could “legitimately pass upon the constitutionality of federal enactments are federal courts.” See “The Pennsylvania Decision Against the Conscription Act,” *New York Times*, Nov. 13, 1863, at 4; “A Copperhead Opinion of the Conscription Act,” *Chicago Tribune*, Nov. 14, 1863, 2 the Pennsylvania State Supreme Court had no legal right or authority to nullify an act of Congress by declaring it unconstitutional under the rule of *Ableman* and thus the “Copperhead” triumph would be immediately reversed; “Editorial Article 3,” *New York Herald*, Nov. 14, 1863, 4 the *Kneedler* decision amounted to nothing because only the Supreme Court could determine the constitutionality of any act of Congress.

⁷⁵⁴ “Judge Woodward’s Opinion on the Conscription Act,” *North Branch Democrat*, Dec. 1, 1863, 2. Sickles worried that the people had submitted “tamely” to one constitutional violation after another until the decisions of their supreme courts, “the last barrier between them and despotism,” was broken down and violated, paralyzing the “great living, throbbing heart of liberty.”

of the citizen.”⁷⁵⁵ The question of the constitutionality of the Conscription Act was settled unless overruled by the Supreme Court of the United States or the “high law of Federal Dictatorship.”⁷⁵⁶

Pennsylvania’s Democratic press saw other reasons to be skeptical of the decision’s lasting effects. Just days after the *Kneedler* decision on November 11th, a report from New York suggested that recruiting in Pennsylvania would be “severely affected” by the Pennsylvania Supreme Court’s decision. The *Daily Picayune* argued it was unlikely Republican Governor Curtin would “interfere in any way to sustain” the decision which until reversed was “claimed to be of binding force within that state.”⁷⁵⁷ Still the *Picayune*’s editor did not believe that judgment would stand long since Chief Justice Lowrie’s replacement Agnew was an “unconditional friend” to the administration. They presciently assumed the election results settled the judgment of the courts and that the Pennsylvania Supreme Court would reverse its own decision when it next met. Constitutional conservatives were aware that while they had secured a significant victory, they remained in a precarious position. It was possible they only achieved a pyrrhic victory.

Meanwhile, the Republican press was swift in its condemnation of the *Kneedler* majority’s decision. Philadelphia lawyer and public intellectual Sidney George Fischer felt the court’s majority were “partisans” whose object was to “oppose the government in the prosecution of the war.” The intended effect of the decision was to create a collision between the

⁷⁵⁵ “The Conscription Law Declared to be Unconstitutional,” *Democratic Banner*, Nov. 18, 1863, 2.

⁷⁵⁶ “Unconstitutionality of the Conscription Act,” *Reading Gazette and Democrat*, Nov. 14, 1863, 2. Similarly, the *Detroit Free Press* agreed that *Kneedler* effected a statewide injunction, meaning the Conscription Act in the State of Pennsylvania was a nullity. It could not be enforced in the state unless the Supreme Court of the United States overruled *Kneedler*.” “Unconstitutionality of the Conscription Act,” *Detroit Free Press*, Nov. 24, 1863. 3.

⁷⁵⁷ “Letter from New York: Special Correspondence of the Picayune,” *The Daily Picayune*, Nov. 26, 1863, 2. The paper also noted that while Governor Curtin was unlikely to interfere in any way to sustain the decision which until reversed was “claimed to be of binding force within the state.” It was not thought “probable that the judgment will stand long as law” because of the election and it was assumed that the election “unsettled” the judgment of the court and that the Supreme Court, once it met again, would reverse its decision.

civil authorities of the state and federal government to grant a “desired pretext” for mob violence like the draft riots.⁷⁵⁸ For Fischer at least, there was no difference between street violence and judicial solutions. Similarly, The *Philadelphia Press* stated that the majority advanced the “dangerous doctrine that state rights are above national authorities,” the very doctrine used by “traitors to destroy the Republic.”⁷⁵⁹ Woodward and the majority used the law “as an instrument to embarrass the government” and relied on a “forced construction” of the Article I powers which ignored the lack of any limit to Congress’s power.⁷⁶⁰ Similarly, Philadelphia’s *Daily Evening Bulletin* saw this argument as the heart of Woodward’s “elaborate” and “radical” defense of “state rights” which was clearly political because he saw the law a “poor and inefficient war measure.”⁷⁶¹ The *Press* desired to avoid speaking harshly of Woodward, but felt the opinion read with the tone of a politician not reflective of an eminent and respected lawyer.⁷⁶²

The *Franklin Repository* was blunter about the political nature of the decision, referencing the court’s “judicial vengeance” for their election losses. Only those guilty of “open treason” were not filled with shame upon the decision and they thought mainstream Democrats

⁷⁵⁸ Fischer, *A Philadelphia Perspective*, 207-208.

⁷⁵⁹ “The Supreme Court and the Conscription Act,” *Huntingdon Globe*, Nov. 18, 1863, 2 (quoting *Philadelphia Press*). The *New York Herald* wrote that while the Conscription Act was “unwise and unnecessary,” its constitutionality could not under common sense be disputed because Congress was expressly given the power to declare war, raise and support armies, and make all laws “necessary and proper.” These combined powers were so broad and comprehensive that no amount of “pettifogging” could misconstrue them. Woodward and the majority followed their “state rights notions” that the federal government was “utterly powerless to maintain its own existence.” Essentially their logic flowed from the logic of secession. The *Kneedler* decision amounted to “nothing” because only the Supreme Court could determine the constitutionality of any act of Congress. *Kneedler* merely showed Woodward to be “still floundering among the State rights and nullification sophistries of Calhoun” defeated by Jackson thirty years earlier. “Editorial Article 3,” *New York Herald*, Nov. 14, 1863, 4.

⁷⁶⁰ “The Conscription Act,” *Philadelphia Press*, Nov. 13, 1863, 2.

⁷⁶¹ “Opinion of Judge Woodward,” *The Daily Evening Bulletin*, November 12, 1863, at 1; J. Cutler Andrews, “The Pennsylvania Press During the Civil War,” 28. The *Daily Bulletin* was known for being friendly to Simon Cameron and identifying itself with Radical Republicanism.

⁷⁶² “Decision of the Supreme Court,” *Philadelphia Press*, November 12, 1863, 1. The paper felt Woodward’s opening remarks about the effects on the law on the poor were below the dignity of the Court.

who supported Woodward in the election could not have expected this outcome.⁷⁶³ It was “narrow prejudices” and “petty political uses” which had invaded the sanctuary of the Court by “tempting its high priests with the dazzling bauble of ambition.” The *Repository* theorized that the decision was planned as soon as the Pennsylvania draft was announced in early July when Democratic politicians in Philadelphia resolved to test the constitutionality of the act in the court in order to achieve political results.⁷⁶⁴ The charge was less that the Democratic judges of the court were party to the plot, but that these Philadelphia Democrats confidently relied upon the Democratic majority on the Court to accept their constitutional arguments. The *Repository* even asserted that the case of the three conscripts was “made up” by the trio of Philadelphia attorneys and rebel sympathizers.⁷⁶⁵

Despite the bold, vindictive language of some Republicans who were certain the decision was purely political, other Pennsylvania Republican papers focused on rebutting the majority’s constitutional arguments. The Philadelphia *Inquirer* spent a week issuing daily responses to the decisions of Lowrie and Woodward, primarily arguing that they ignored the founders’ Constitution and the needs of a nation at war.⁷⁶⁶ For instance, one headline proclaimed that

⁷⁶³ “A Startling Decision by the Supreme Court-The Conscription Act Declared Unconstitutional By Judges Lowrie, Woodward, and Thompson-Strong and Reed Affirm It-The Secret History of This Secret Judicial Vengeance Against Our Nationality-Its Early Correct Ensured by the Late Election,” *Franklin Repository*, Nov. 18, 1863, 1.

⁷⁶⁴ The comment ignored that going back to March, constitutional conservatives, especially Governor Seymour, desired to resolve the issue in the courts. The events of July only heightened that desire, as described in Chapter four. The *Repository* also charged that the lawyers brought their petition to Woodward who brought the case before the full court in order to force his colleagues to take share of the responsibility, as he had “hardly gotten over the heat of his late strife in the political area.”

⁷⁶⁵ *Ibid*; See Also “The Pennsylvania Decision Against the Conscription Act,” *New York Times*, Nov. 13, 1863, at 4. The *Wellsboro Agitator* likewise stated the majority were three “sore-headed politicians” who acted for no other purpose than to make a record of the “brief and petty conflict of authority” acted against the constitutional history of the country in an exhibition of how “meanly vexed ambition dies.” *Wellsboro Agitator*, Nov. 18, 1863, 2 the decision was the “wiggle of the Copperhead tail.”; “A Copperhead Opinion of the Conscription Act,” *Chicago Tribune*, Nov. 14, 1863, 2 The bare majority made a “hostile decision” that showed they were “secession sympathizers of the worst description.”

⁷⁶⁶ “Supreme Court of Pennsylvania: The Conscription Act: Dissenting Opinion of Judge Strong. The Right to Raise Troops by Draft Conveyed to Congress and the Executive by the Constitution. The Associate Justice

Lowrie disagreed with “Madison and the Fathers.”⁷⁶⁷ The *Inquirer* editors argued Lowrie’s ruling that the Conscription Act was unconstitutional was mere dicta, because he had only directed an order be entered granting the preliminary injunction to protect the plaintiffs.⁷⁶⁸ Thus, Lowrie’s order could have neither a statewide or national effect on the act. Further, Lowrie’s argument was counter to constitutional tradition, especially the 1814 conscription plan. The *Inquirer* cited Monroe’s plan as having passed *both* houses with a discussion “so prolonged and comprehensive as to settle the questions in the minds of large majorities, in both the Senate and the House.”⁷⁶⁹ The editors emphasized that any student of history would conclude Congress in 1814 supported conscription, as despite “able and bitter opposition” similar to that against the Conscription Act, the bill passed the Senate 19 to 12 and the House 84 to 72.⁷⁷⁰ Once again, even if constitutional conservative motives were pure, Republicans believed their constitutional arguments failed to convince.

The press reaction to *Kneedler* attests to the way rather than concluding the debate over the constitutionality of conscription, *Kneedler* reignited the public constitutional debate over the Conscription Act. Constitutional nationalists felt it was obvious both that the arguments of constitutional conservatives were wrong and that their constitutional victory would be lost in due time. Constitutional conservatives were convinced they needed to act to secure the fruits of their November victory. The battle would temporarily move back to Congress.

Differs Altogether with the Chief Justice,” *Philadelphia Inquirer*, Nov. 13, 1863. 2. The *Inquirer*’s headlines testify to this discursive pattern. Some examples include: “Every Man Owes Military Service to the Government that Protects Him,” “Our Independence Secured by a Draft During the Infancy of the Nation,” “The Conscription Act Does Not Interfere with State, Civil, or Personal Rights,” and “It Is Necessary to Secure National Sovereignty.”

⁷⁶⁷ “Judge Lowrie’s Decision Against the Conscription Act: He Disagrees with Madison and the Early Fathers,” *Philadelphia Inquirer*, Nov. 12, 1863. 4.

⁷⁶⁸ *Ibid.* The *Inquirer* interpreted Lowrie’s opinion as only discussing the constitutionality of the act in “arriving at this conclusion.”

⁷⁶⁹ *Ibid.*

⁷⁷⁰ “Judge Strong’s Opinion Maintaining the Conscription Act,” *Philadelphia Inquirer*, Nov. 13, 1863. 4.

Congress Reacts

After the November press debate, constitutional conservatives in Congress spent the few days before the December recess attempting to secure the fruits of victory from *Kneedler*. In the House, Pennsylvania Democrat Philip Johnson submitted a preamble resolution recognizing that the Pennsylvania Supreme Court decided the Conscription Act was contrary to and violative of the Constitution and therefore null and void. It was thus the duty of the President and his officers to either acquiesce that decision or bring the question involved before the Supreme Court for final adjudication. Johnson's resolution recognized that Congress could also choose to pass an act which removed the objectionable sections.⁷⁷¹ Thaddeus Stevens brought laughter by responding that he hoped Johnson would withdraw the resolution since the decision had been overruled, an apparent premonition that the ruling would be overturned.⁷⁷² At that moment, arguments had yet to be presented before the Court in the review of the preliminary injunction but the government had submitted its motion to dissolve the injunction and arguments were scheduled. Johnson demanded a vote when it was moved to lay the resolution on the table, a vote he lost 80 to 43.⁷⁷³ The following day, fellow Pennsylvania Democrat Sydenham Ancona introduced a resolution for unconditional repeal of the Conscription Act. Ancona's resolution emphasized federalism-based objections and labeled the Conscription Act "oppressive, unjust, and unconstitutional" which removed state control of their militias and subjected states and the people to the "unlimited power of the federal government."⁷⁷⁴ Unfortunately for Ancona, by the time Congress reconvened in early January, the Pennsylvania Supreme Court had already heard

⁷⁷¹ *Republican Compiler*, Dec. 28, 1863, 2.

⁷⁷² *Ibid.*

⁷⁷³ *Cong. Globe*, 38th Cong., 1st Sess., 92.

⁷⁷⁴ *Daily National Intelligencer*, Dec. 23, 1863, 2; *Congressional Globe*, 38th Cong., 1st Sess, 95. (Ancona complained too that it was calculated to create a "central military despotism," and falsely imputed the crime of desertion on any man whose name was drawn in the "lottery of death" and who did not join the army)

argument to rescind the injunctions. Whatever slim chance constitutional conservatives had in Congress fell to the wayside as constitutional conservatives also faced the prospect of seeing their greatest victory fall apart.

As 1863 came to a close, the federal government prepared to ask the Pennsylvania Supreme Court to reverse its decision. They did so before a court with a new member, Daniel Agnew, who had made clear in a widely-distributed pamphlet in 1863 that he supported the constitutionality of conscription.⁷⁷⁵ The government had waited for Chief Justice Lowrie's term to close. Constitutional conservatives had tried to capitalize on their greatest victory in the constitutional struggle over conscription. By January, the fight would already be mostly over when the Pennsylvania Supreme Court reversed itself.

⁷⁷⁵ Daniel Agnew, *Our National Constitution: Its Adaptation to a State of War or Insurrection* (Philadelphia: C. Sherman Son & Co., 1863), 12-18. Agnew took a robust position in defending the administration's actions, noting that during a war of insurrection, the "peace powers of the Constitution were no longer adequate to maintain its supremacy." The "positive powers" of the Constitution include the powers to declare war, "raise and support armies," provide and maintain a navy, to regulate the armed forces, to provide for "calling forth the militia," and to organize the militia when employed in service of the United States. Those powers disclosed the "most express and plenary kind" of authority to put down rebellions.[#] The Militia Acts of 1795 and 1807 and *Martin v. Mott* combined to show that the President was the "sole and exclusive judge whether the exigency has arisen to call forth the militia." The President had "unconditional" power to use the whole force of the nation.

CONCLUSION: POST-1863 JUDICIAL BATTLES AND 20TH CENTURY CHALLENGES TO CONSCRIPTION

By the time major challenges to conscription came once more during World War I, the sands had shifted significantly. For one, the most important victory constitutional conservatives secured in 1863, *Kneedler v. Lane*, was quickly reversed in January 1864 and no appeal ever made it to the Supreme Court, where Chief Justice Taney awaited the opportunity to strike down the draft. Once the war was over, state and federal courts continued to fight over issues stemming from the Conscription Act, most prominently state court *habeas* jurisdiction and the power of localities to tax citizens to pay bounties for substitutes. In these cases, some constitutional conservative judges and lawyers hoped to secure the right of state courts to intercede in any future draft. But when the Supreme Court reiterated in 1872 the rule of *Ableman v. Booth* while upholding the power of the federal government to conscript in *dicta*, the judicial war was over. The cases during World War I cemented this shift, as despite the efforts of lawyers in numerous federal cases to leverage the Thirteenth Amendment against conscription in combination with the federalism-based objections of 1863, the arguments were seen as untenable in the context of a world war. The Civil War cases were understood to uniformly uphold the power of conscription and any sense of the struggle against this power was erased. By the Vietnam Era, the long-standing doctrine was well-secured. The question had been settled a century before.

By January 1864, the tide had entirely turned against the constitutional conservatives who had briefly tasted victory. The federal government waited barely a month after the issuing of the November preliminary injunction in *Kneedler* before asking the court to revisit the case. On December 12, 1863, special counsel John Knox appeared for the government to ask the court to

dissolve the preliminary injunction granted in the case.⁷⁷⁶ Justice Strong heard the motion, which he granted to be argued before a full bench.⁷⁷⁷ Oral argument, once it began on the 30th, meandered on for days. Peter McCall, George Biddle, and Charles Ingersoll all made arguments against reversing the injunction, but only Ingersoll left a personal record of what was said. Newspaper accounts suggest that Biddle argued the motion to dissolve was out of order, as there were no new facts to show any harm had been done to the defendants. McCall and Ingersoll argued the Conscription Act remained unconstitutional and that the state court took proper jurisdiction over the case.⁷⁷⁸

In the re-argument, Ingersoll could not merely reiterate the core federalism-based arguments that were successful in November. He had to deal squarely with the jurisdictional issue. Ingersoll asserted that the defendants' motion to dissolve the injunction was "so extraordinary that it would be vain to look for precedents to justify it."⁷⁷⁹ He started by revisiting the circumstances of the government's lack of appearance in September, believing it be a cynical ploy. Ingersoll noted accurately that at the September 23 argument, government counsel and the enrolling officers did not appear despite being given notice of the argument after having ask for the copy of the bill for a special injunction and communicating with the plaintiff's attorneys.⁷⁸⁰ He argued that by Pennsylvania rule, unlike open judgments at common law, special injunctions

⁷⁷⁶ "Jan. Term 1863, Equity, Kneedler v. Lane et al., Motion to Dissolve Preliminary Injunction," Dec. 12, 1863. (unpublished material, PA State Archives)

⁷⁷⁷ "Legal Intelligence," *Philadelphia Inquirer*, Dec. 14, 1863, 3.

⁷⁷⁸ "Supreme Court of Pennsylvania at Nisi Prius-Chief Justice Woodward and Judges Thompson, Strong, Read, and Agnew," *Philadelphia Press*, Dec. 31, 1863. Irwin Greenberg characterized Ingersoll's arguments as the same as those used by most other opponents of conscription, taking a "rigid states' rights, strict construction position" focusing on proving the difference between the state militia and federal army. Irwin F. Greenberg, "The Aristocrat as Copperhead," *Pennsylvania Magazine of History and Biography*, Vol. 93 (April 1969): 207.

⁷⁷⁹ Charles Ingersoll, *Conscription: Argument before the Judges of the Supreme Court of Pennsylvania, in the case of Kneedler et al. vs. Lane et al. Dec. 30, 1863* (self-published), 339.

⁷⁸⁰ *Ibid.*, 340. By Ingersoll's account, John Knox had merely "pretended" not to be in town on September 23 and actually refused to take part in the argument, yet he now asked for a motion to dissolve the injunction.

once granted were only reversed if something happened to “induce the Court to pick out their own work.” Otherwise, such motions would be made endlessly after any such loss.⁷⁸¹ Even if Ingersoll was wrong about the novelty of the motion to dissolve, the federal government’s actions were consistent with a strategy to avoid a decision at the Supreme Court level at all costs.

Outside the jurisdictional issue, Ingersoll’s constitutional arguments mostly followed constitutional conservative constitutional rhetoric, focusing solely on federalism-based arguments with no mention of personal liberty. Ingersoll made two core arguments: the power to “raise and support armies” was not unlimited and secondly, the power to impose military conscription was a power to take possessions and transfer them to “the public chest” and thus not properly a constitutional power.⁷⁸² Looking to constitutional history, Ingersoll believed Strong and Read misread precedents in their November dissents and failed to understand the significance of the distinction between the army and militia. He did not believe there was American or English precedent for military conscription since any government with a power to conscript and an “unlimited right to raise armies by force” was necessarily tyrannical.⁷⁸³ Like other constitutional conservatives, Ingersoll did not reject the power to conscript *per se*—he noted that states always had the power to call out the militia and compel their service. The difference between the two forces was that the militia were drafted by the *states* and the regular army filled by volunteers.⁷⁸⁴

⁷⁸¹ *Ibid.*, 341. Ingersoll contended the motion was a “grave error” given the government had condemned the Court and acted “in derision” of it while refusing to show the constitutionality of the law in September.

⁷⁸² *Ibid.*, 342.

⁷⁸³ Ingersoll noted that the American Revolution showed the “national horror and universal detestation” of conscription. Given the history of English impressment, Ingersoll asked the court why it was not argued that Congress, by the power to “provide and maintain a navy,” was not given impressment power. He saw it as a “strange distinction” between the national conscription for the army and the “press-gang” for the Navy. *Ibid.*, 348.

⁷⁸⁴ *Ibid.*, 343.

Precedent and constitutional history occupied much of Ingersoll's argument. Answering Read's November dissent, he contended that General Knox's attempt as the first Secretary of War to enact conscription was an unapproved plan for the "general arrangement of the militia," not a compulsory draft, and one ultimately scrapped when the 1792 Militia Act was passed.⁷⁸⁵ Ingersoll aimed to convince the court that the "fiercest" and "most ingenious opposition" at the Constitutional convention was made to giving *any* congressional power to raise armies.⁷⁸⁶ He believed the norm at the founding was no compulsory military duty outside of voluntary enlistment, as conscription was the recourse of tyrannical European despots. Ingersoll also believed constitutional nationalists and the federal government wrongly employed the Monroe plan of 1814, ignoring that it left the draft at the hands of county courts or militia officers and the successful opposition to the plan.⁷⁸⁷ The constitutional argument against conscription was victorious in 1814 because some of the "ablest men" in Congress "violently assailed" the bill, including Daniel Webster and Jeremiah Mason.⁷⁸⁸ Ingersoll felt that the American constitutional tradition made clear that national conscription was unconstitutional and undemocratic beyond its injuries to the poorest citizens.⁷⁸⁹ Nothing had changed in the interim other than the participation of the government's attorneys.

The following morning, United States Special Counsel John C. Knox appeared before the court to present his oral argument, certain that the court should never have issued its November

⁷⁸⁵ *Ibid.*, 345. He added that the 1790 proposal of Rhode Island for an amendment that "no person shall be compelled to do military duty, otherwise than by voluntary enlistment, except in cases of general invasion did not endorse conscription. *Ibid.*, 345-46.

⁷⁸⁶ *Ibid.*, 346.

⁷⁸⁷ *Ibid.*, 352. Significantly, Ingersoll, contrary to most accounts, believed the "opinion of both branches of the Legislature" opposed it as unconstitutional.

⁷⁸⁸ *Ibid.*, 353.

⁷⁸⁹ Repeating Wharton's argument from September, Ingersoll saw conscription as a "simple and ready means for obtaining" soldiers to carry on war and as such, was a "system of confiscation" that fell "peculiar hardships upon the poor." *Ibid.*, 348-49.

ruling. His motion to dissolve made clear that the government did not believe that the state courts held jurisdiction to inquire into the constitutionality of federal acts. Knox began his argument with three questions. He asked whether the supreme court of a state could by injunction prevent the officers of the United States from executing an act of Congress on the grounds it is unconstitutional, what the remedy should be for such a tort against a government officer, and whether the Conscription Act was constitutional.⁷⁹⁰ Knox's argument primarily focused on three considerations: an expansive interpretation of the "necessary and proper" clause under *McCulloch v. Maryland*, the understanding that the draft acted upon male citizens directly to take them into the United States army and thus did *not* affect the state's militias, and that the state courts held no jurisdiction in such cases, involving the novel use of equity law by the plaintiffs' lawyers.

Knox argued that in *Ableman*, Taney's decision unanimously decided that state courts could not by writ of *habeas corpus* or *any other* proceeding interfere with acts of an officer of the United States. The *Ableman* decision was not premised upon the constitutionality of the underlying Fugitive Slave Act, but that officers acted under the authority of the United States. Knox did not see any distinction that could be made between the acts of a commissioner under the Fugitive Slave Act of 1850 and those of the Board of Enrollment under the Conscription Act of 1863. From here, Knox imagined the horrors of nullification that would be revisited should the court uphold the November special injunction. Knox reasoned that if state courts could enjoin officers from executing their duties under an act of Congress on the grounds it was unconstitutional, nothing could prevent state courts from nullifying "all the acts of the National

⁷⁹⁰ "Legal Intelligence: Kneeder v. Lane et al.-Motion to Dissolve An Injunction," *Philadelphia Inquirer*, Dec. 31, 1863. 3.

Legislature” and threatening the “very existence of the Government.”⁷⁹¹ As many Republicans argued in the public constitutional debate, the constitutional argument against conscription appeared to be treasonous in its cascading effects, if not on its face.

Still, even if the court had proper jurisdiction, Knox was certain that the Conscription Act was clearly constitutional. He paralleled the existing arguments of constitutional nationalists by noting that Article I, Section Eight provided the power to “raise and support” armies, which was “absolute in its nature.” The Constitution was “entirely silent” as to appropriate means, leaving it entirely to Congress to determine according to the exigencies of the time. Thus, Knox’s argument rested on the meaning of “necessary and proper” and the rule of *McCulloch v. Maryland*.⁷⁹² The Conscription Act was not plainly unconstitutional because it did not wrestle away control of states over their militias.⁷⁹³ Nothing, Knox argued, precluded the federal government from in times of exigency compelling a portion of the militia to render military service in the national army. To close, Knox prayed that the judges would deny the effort to take away the federal government’s power to compel military service in order to protect itself against the “vile Rebellion” and the commission of the “most horrid crimes.”⁷⁹⁴ As much as constitutional conservatives were certain of their constitutional arguments, they never lost sight of the primary need of government to win the war and save itself and were confident the same

⁷⁹¹ “Legal Intelligence,” *Philadelphia Inquirer*, Dec. 31, 1863. 3. Part of Knox’s contention was that the particular strategy of the *Kneedler* lawyers was a distinct threat since as if an injunction could be substituted for the writ of *habeas corpus*, the suspension of the writ could be “virtually annulled.”

⁷⁹² *Ibid.* Congress could not pass an act “entirely outside of its enunciated powers” and preclude judicial inquiry over its constitutionality by declaring said act “necessary and proper,” but Congress’s latitude for the means chosen was wide so long as the means were connected to the end sought unless it would itself be “manifestly and flagrantly” a constitutional violation.

⁷⁹³ *Ibid.* Knox observed that “chief control of the militia” lay with Congress and the term “national forces” did not annihilate the state militia because the undrafted individual remained a militia man only *subject* to the draft.

⁷⁹⁴ *Ibid.*

history did not preclude their ability to use all means to do so. In a matter of weeks, Knox and the government would secure the victory that would end the threat to conscription.

Just over two months after the November decision, Justice Strong, joined by Justices Read and Agnew, issued his majority opinion in *Kneedler II* dissolving the injunction issued in November and upholding the constitutionality of the Conscription Act.⁷⁹⁵ Knox and the government won on all three counts. Strong agreed with Knox that plaintiffs had not presented “a proper case for the interference of a court of equity, by injunction, even if the act of Congress was unconstitutional.”⁷⁹⁶ The November orders were merely pending and could have no possible beneficial effect upon the condition of the three complainants. Otherwise, they would “hold out to every drafted man a temptation to resist all attempts to coerce him into military service.”⁷⁹⁷ It followed that no statewide injunction resulted from *Kneedler* even if the injunction declared the act unconstitutional.

Lastly, Strong felt that the November decision was of an “extraordinary and unprecedented” character since he could not recall a state court finding a Congressional act unconstitutional upon a motion for an interlocutory order.⁷⁹⁸ He saw the injunction issued in *Kneedler I* as having effectively nullified Lincoln’s order suspending *habeas corpus* within Pennsylvania while ignoring the rule of *Ableman v. Booth*. Justice Read’s brief concurrence dramatically followed Strong’s invoking of nullification.⁷⁹⁹ Read believed he had support both in

⁷⁹⁵ In *Kneedler II*, the second hearing of the case, the court was called *Niri Prius*, meaning that the orders granted were that of a single judge. All judges of the Supreme Court were called to advise on the final decree, but the orders were that of the original judge presented with the case. In *Kneedler I*, the orders were issued under Justice Woodward. In *Kneedler II*, orders were issued by Justice Strong. It is unclear why the full court was called to advise in both cases, but the likelihood is that it was connected to the significance of the underlying issues.

⁷⁹⁶ *Kneedler v. Lane*, 45 Pa. 238, 295 (1864). Orders at equity for interlocutory injunctions were not a matter of right but granted at the discretion of the chancellor.

⁷⁹⁷ *Ibid.*, 299 (Strong, J.)

⁷⁹⁸ *Ibid.*

⁷⁹⁹ *Ibid.*, 300-01 (Read, J., concurring). He argued that outside of the South Carolina nullification crisis, no state court before the filling of these bills had claimed the power to prohibit and restrain by injunction officers of the

Pennsylvania and New York precedent. After the September oral argument in *Kneedler I*, Read had copies of Cadwalader's *Antrim* opinion and Judge Bacon's from *In RE Hopson* sent to him. Bacon's opinion proved to Read that the use of the *habeas corpus* by state courts to take persons out of the custody of officers of the United States acting under the authority of Congress failed "entirely."⁸⁰⁰ Injunctions could not be used by state courts to effectively circumvent the denial of state court jurisdiction.

With both Strong and Read focusing their opinions on denial of state court jurisdiction, Justice Daniel Agnew addressed the constitutional validity of the Conscription Act. Agnew echoed other constitutional nationalists in his plenary interpretation of the "necessary and proper" clause. For him, the power to "raise and support armies" was exclusively vested in Congress and therefore any legislation upon the subject was exclusive. Constitutional tradition made clear the inherent powers of a nation to make war for self-preservation came with "all the means of making war effective."⁸⁰¹ Finally, Agnew responded to the plea that he should sustain *Kneedler I* as good precedent under the rule of *stare decisis*. He responded that he would not sustain the decision of a "bare majority against a strong dissent establishing the doctrine that national forces cannot be raised to suppress insurrection," a preliminary decision made in a "one-sided hearing of the opponents of the law during a time of high excitement, when partisan rage

United States, acting under the authority and in strict conformity to an Act of Congress, from performing their official duties, and thus practically nullifying it within the State."

⁸⁰⁰ *Ibid.*, 305; John M. Read to Hon. John Cadwalader, September 9, 1863, Historical Society of Pennsylvania. Read also cited the *Spangler* opinion of the Michigan Supreme Court and Judge Smith's opinion in *In Re Jordan*. See *In Re Jordan* (cited for the proposition that upon a return to a writ of *habeas corpus*, a state judge or court is *judicially apprised* that the party is in custody under the authority of the United States and such judge or court can proceed no further). Read noted the 1836 Pennsylvania Judiciary Act did not grant to any court the authority to use state power to prohibit the execution of an Act of Congress.

⁸⁰¹ *Kneedler*, 45 Pa.313 (Agnew, J., concurring).

was furiously assailing the law.”⁸⁰² Agnew, along with Strong and Read, certainly felt that they had done so according to their convictions of law and patriotism.

In his dissent which Judge Thompson joined, Woodward, who became Chief Justice upon Lowrie’s electoral defeat, protested what he believed was an unfair and unprecedented reversal. The dissenters argued it was the Republican majority who had performed a parliamentary trick and acted politically. The United States’ failure to have counsel make an appearance in September 1863 did not mean that the defendants were not given a full opportunity to be heard. To Woodward, *Kneedler I* was thus both binding on the defendants as if they had appeared and on all citizens of the state—the injunction had statewide effect. He complained that it would have been easy for the defendants to “put the record into shape for review” by filling answers to the bills of the plaintiffs.⁸⁰³ Then the Pennsylvania Supreme Court could have made the interlocutory decree final without further argument and the record thus could be presented if desired to the Supreme Court of the United States. Thus, Woodward imagined if proper procedure had been followed, constitutional conservatives would have gotten their wish to get the final decision of the Supreme Court. Instead, he believed the federal government simply waited for Lowrie to leave the bench in December. Only on December 17 did the government appear before Judge Strong and moved to dissolve the injunction and the motion gave no answer, plea, demurrer, affidavit, or reason filed on the record but was granted anyway.⁸⁰⁴ Woodward did not avoid the

⁸⁰² *Ibid.*, 307-10. Agnew fumed that this “pernicious error” needed to be corrected.

⁸⁰³ *Ibid.*, 324 (Woodward, C.J., dissenting).

⁸⁰⁴ *Ibid.*, 325-26. Woodward’s view was that though docketed *Nisi Prius*, *Kneedler I* should be treated as a decision of the whole Supreme Court. This was a norm of the court’s procedure. He cited Justice Strong’s decision from the previous fall in *Ewing v. Thompson*, in which Woodward concurred. Judges at *Nisi Prius* could dissolve a special injunction, but only as a direct and full denial of the equity requested or upon an affidavit disproving plaintiffs’ grounds for equity, which Woodward said was not shown by the government. Further, new trials and re arguments could only be ordered by the court who first heard the case—in this case, Woodward himself.

implications of his argument. As he remarked later in his opinion, he felt that if Lowrie had been reelected, the motion would have never been made.⁸⁰⁵

It was an extraordinary claim. Woodward felt the stability of an injunction should not fall upon the personnel of the court and their different constitutional opinions, for no other cases of constitutionality could be considered settled. Woodward accused the government of awaiting the outcome of an election in order to get their desired result. Constitutional conservatives did not feel they politicized the constitutional debate over conscription—the administration did by pursuing a strategy to avoid unfriendly courts at all hazards. Woodward also was certain the November majority did not create new, unbounded precedent for the court to set aside federal acts. Instead, it was Justice Strong’s majority that now raised the possibility that dissenting judges could regularly overrule majority decisions on the same record and facts. Otherwise, a dissenting judge “may undo the work of the whole court, or, what is worse, compel them to go over the same ground again and again” undermining institutional stability.⁸⁰⁶ Lastly, Woodward thought the November decision should stand for public interest reasons. He felt the November decision gave the government ample opportunity to obtain a Supreme Court resolution which the public demanded.⁸⁰⁷ Woodward thus openly admitted he shared the aspiration of other constitutional conservatives that the case might get appeal to the Supreme Court.

Woodward otherwise used his dissent to revisit the key constitutional arguments against conscription, with concerns over maintaining antebellum federalism at the heart of his points. He again emphasized strict constructionism and structuralism as the proper approach for

⁸⁰⁵ *Ibid.*, 329.

⁸⁰⁶ *Ibid.*, 326-28. Citing treatises and cases from “nearly every state in the Union,” Woodward suggested they established “beyond all cavil or doubt, that an injunction granted after a full hearing and great deliberation, is not to be dissolved either by a single judge or the whole court upon mere motion, without answer, plea, or affidavit.”

⁸⁰⁷ *Ibid.*, 328. Woodward conceded that the November decision did not halt the government from enforcing the Conscription Act against anyone in the state.

constitutional review.⁸⁰⁸ Woodward believed that the Constitution could not simultaneously authorize the militia to be drafted irrespective of state authority when it expressly recognized the right of states to maintain their militia. Finally, he answered the majority's argument that the November majority had improperly used equity to get around the suspension of *habeas corpus*. Woodward reasoned that *habeas corpus*, normally the proper venue for relief, was suspended and because equity jurisdiction could only be ousted if an adequate remedy otherwise existed, the court had acted properly.⁸⁰⁹ *Ableman* did not alter jurisdiction, because Woodward interpreted it to mean that while state courts had no power to interfere with or resist the process or judgments of the federal courts, the rule was reciprocal.

Strong's decision was a bitter pill for Woodward and Thompson to swallow. The dissenters and majority accused the other of diverting from court norms and scheming to gain a political result. Both sides felt they were defenders of the Constitution against brinkmanship and political warfare. The stakes were high and judges on both sides fully understood the consequences for the Lincoln administration and the war effort. Yet, under the circumstances and despite the accusations of politicization, between the two decisions, the justices of the Pennsylvania Supreme Court had spilled nearly one hundred pages on the constitutionality of conscription. Along with Judge Cadwalader, every judicial actor considering conscription had employed historical originalism and shared reverence for the founders' Constitution. The losses for constitutional conservatives in both state and federal court in a matter of months secured the Conscription Act's constitutional footing while avoiding a final decision before the Supreme

⁸⁰⁸ *Ibid.*, 331. Woodward believed as a written document, the Constitution had to be taken as a whole "and every specific grant, however unqualified the language in which it is expressed, must be so construed as to be consistent with other provisions of the instrument."

⁸⁰⁹ *Ibid.*, 336. The suspension of the writ meant that the court had to act as if they "had never had *habeas corpus*" and thus, the court could not deny equity jurisdiction on the ground that there is remedy at law.

Court. Ultimately, the government's victories were part of the way in which the Civil War bolstered the expansion of federal power and jurisdiction, sowing the seeds of the modern federal system.

Taney's Draft Opinion

Kneedler II was a supreme disappointment for constitutional conservatives, especially because they were unable to get the case reviewed by the Supreme Court. Unbeknownst to them, in the spring of 1863, Chief Justice Taney drafted a private, unofficial opinion finding the Conscription Act unconstitutional. It was apparent he would have gladly accepted an appeal from the Pennsylvania Supreme Court to uphold *Kneedler I* and declare conscription unconstitutional.⁸¹⁰ In his unofficial opinion, Taney shared the federalism-based objections of constitutional conservatives as he attempted to explain away his strong assertions of federal power in *Ableman*.

Taney understood the primary question concerning the Conscription Act to be whether the Constitution, under an appropriate understanding of federalism, gave Congress power to draft citizens directly into the federal army. In dual sovereignty language similar to that of *Ableman*, Taney described each sovereign government as operating independently within the limits of assigned sphere of action and supreme within its own limits. He believed *Ableman* was consistent with his position on conscription, as “neither the federal government, nor that of a state, could lawfully afford protection to the citizen beyond the limits of their respective powers.”⁸¹¹ Taney believed Article IV meant that the federal government had “no inherent and

⁸¹⁰ Charles Grove Haines & Foster H. Sherwood, *The Role of the Supreme Court in American Government and Politics, 1835-1864* (Berkeley: University of California Press, 1957), 488.

⁸¹¹ *Ibid.*, 489 It was a “divided allegiance but not inconsistent-the boundaries of each sovereignty being defined and established, and not interfering with one another.” Taney observed that Article IV “expressly recognized state sovereignty” and that states must be “sovereign within the meaning of that article.” *Ibid.*

original powers of sovereignty,” but only what the states had delegated to it.⁸¹² Any other exercise of power was usurpation of state sovereignty.⁸¹³ Under Taney’s understanding of federalism, each government operated independently of the other within its assigned sphere and thus, neither the federal government nor the state could lawfully claim allegiance due from its citizen beyond those limits.

Taney’s attempt to reconcile *Ableman* with his position on conscription was the most unique aspect of his unofficial opinion. He otherwise largely hewed to the consensus position of constitutional conservatives. Taney saw two distinct and separate military forces established by the Constitution with their own obligations and duties. The power to “raise and support” armies was a general grant of power exclusively federal which necessarily carried with it the power to select personnel and officers and make rules and regulations necessary to control federal military forces completely independent of control by any state.⁸¹⁴ Congress could not at its own pleasure use the power to control the distinct and separate militia.⁸¹⁵ Likewise, under Article II, the President could not “dictate to the militia” unless called into service. Taney believed the Conscription Act entirely ignored this distinction by making every able-bodied male citizen belong to the national forces, effectively eliminating the militia.⁸¹⁶

⁸¹² Taney was likely referring to Article IX, Section IV’s guarantee to every state of a republican form of government.

⁸¹³ *Ibid.* Article I and VI confirmed that federal sovereignty was restricted to express powers and the Eleventh Amendment reflected these limitations and the principle that states “were still sovereigns in their character.”

⁸¹⁴ *Ibid.*, 490. The militia was the other separate and distinct military force established by the Constitution, which “expressly forbade federal control” of the militia in peacetime and only allowed control under “limited and defined” circumstances.

⁸¹⁵ *Ibid.* Taney looked to Article I and II, along with the Second Amendment, for the “sharp distinction” between the two bodies, noting that the militia was composed of state citizens who “retain all their rights and privileges as citizens who when called into service by the United States are not to be fused into one body-nor confounded with the Army of the United States, but called out as the militia.”

⁸¹⁶ *Ibid.*, 491-92. Despite the general grant of power given to Congress under the power to “raise and support armies,” general words could not void “plain and specific provisions” related to the militia and further the general grant itself did not justify “such an extreme construction. He wrote that the act created a paradox of two constitutions with “provisions so repugnant to each other” that if Congress had the power to pass the Conscription

Like other constitutional conservatives, Taney felt even the crisis of the Civil War did not expand Congress's powers. He observed that the framers anticipated precisely such crisis and granted limited powers to the federal government "sufficient to cope" with insurrection.⁸¹⁷ To construct the Constitution otherwise reduced it to an act subject to the mere will of Congress.⁸¹⁸ But Taney could also not stray far the language of antebellum states' rights, writing that power to disorganize state governments was "carefully and jealousy excluded" from the Constitution as well as any right to "interfere in the domestic controversies and difficulties of a state."⁸¹⁹ Had the opinion been converted into a Supreme Court majority opinion, Taney would likely have penned an abrasive denouncement of Lincoln's unconstitutional war policies. This never happened, as the Lincoln Administration successfully avoided a constitutional challenge to conscription reaching the Supreme Court while Taney died in November 1864.⁸²⁰ If the constitutional conservative campaign to challenge was not dead in January, it now had little chance of resurrection without its most powerful supporter.

The Bitter Aftermath of Kneeder in Pennsylvania

Act, it declared all constitutional clauses relating to the state militias "meaningless" and able to be set aside "at the pleasure of Congress.

⁸¹⁷ *Ibid.*, 492 Congress could not choose to "abandon the means prescribed" in the Constitution in favor of what they viewed to be more effective.

⁸¹⁸ *Ibid.*, 494 The framers could not have intended to "give to the new sovereignty they then created the power to paralyze or cripple the old ones, so as to disable them from executing the power expressly reserved to them"

⁸¹⁹ Taney argued that even in the case of rebellion and insurrection against the state government, the federal government could only give assistance when applied for by the state. This was how "anxiously and jealousy the sovereignty of the States was guarded from any interposition by the United States," as Taney thought the federal government was never intended to have the power to "paralyze" state government action and "leave the people to choose between anarchy and purely unlimited military despotism."

⁸²⁰ The Supreme Court did later decide two cases under the Conscription Act, but neither case dealt with the constitutionality of the underlying act. Instead, *United States v. Scott* was a statutory action to determine the meaning of the word "enrollment" in the Conscription Act and the 1864 amended act. As used in both statutes, "enrollment" commanded the boards of enrollment ascertain the persons liable to military duty, determine any exceptions and place their names on the rolls. *United States v. Scott*, 70 U.S. 642, 646-47 (1865).

While *Kneedler II* resulted in upholding the constitutionality of the Conscription Act, it did not entirely foreclose the constitutional battles over conscription in the Pennsylvania courtrooms or among some constitutional conservatives in Congress. In 1865, just weeks after the war came to a close with surrender of Joseph Johnston's army to William Tecumseh Sherman, the Pennsylvania Supreme Court revisited the issues in *Kneedler* in multiple cases related to the Conscription Act. In *Speer v. Borough of Blairsville*, the Court declared the State Bounty Act of March 1864 constitutional. Payment of bounties for volunteers to fill the government's quota for troops in anticipation of a draft was legal. The case dealt primarily with questions of the extent of the taxing power, but it was fascinating because it saw former Chief Justice Lowrie join Jeremiah Black, another former Pennsylvania Supreme Court Chief Justice, as counsel for the appellants.⁸²¹ Lowrie and Black argued that "no man could serve two masters" and Pennsylvania had improperly enacted a separate system even though Congress had "occupied the whole ground" under its Article I powers.⁸²² To uphold the state law was to grant states the right to abrogate Congressional acts—a step towards nullification and secession. Lastly, the law was an improper use of the taxing power because it had no proper public purpose.⁸²³ Lowrie, two years after *Kneedler*, appeared to have accepted the final outcome of the case, reflective of the caution he showed in November 1863. He now argued against the appellees, who made strict constructionist arguments that the federal government had no power to govern the militia, that the Constitution treated the militia and army as distinct units, and that

⁸²¹ *Speer v. School Directors of Blairsville*, 50 Pa. St. 150; 1865 Pa. LEXIS 144 (1865). Appellants sought review of a judgment from the Court of Common Pleas which dismissed their bill in equity filed against respondents, school directors and town council, to restrain them from borrowing money under a bounty law.

⁸²² *Ibid.*, *3. Congress had fixed the amount of bounties and established a uniform tax—a "full system."

⁸²³ *Ibid.*, *3-4. "The conscription of a man was his own personal debt, or burden; exactly as if his barn had been struck by lightning. He could not then go to the legislature and have them authorize the levying of a tax on his neighbors, not for the purpose of enabling him to perform his duty, but to evade it."

it was “not long since it was strenuously argued that it was unconstitutional for the United States to draft men; that volunteering was the only mode contemplated by the framers of the Constitution.”⁸²⁴

Justice Agnew saw no conflict between the power of states to raise money to provide payment of bounties for volunteers and the federal power to “raise armies.”⁸²⁵ Judge Thompson, joined by Chief Justice Woodward, concurred, finding the Pennsylvania law to be a tax for private and individual purposes, not for a proper public purpose.⁸²⁶ Thompson, noting that the court had ultimately upheld the Conscription Act, wrote that there was no public interest in raising bounties for individuals.⁸²⁷ Two years later, in *Washington County v. Berwick*, the court upheld the May 1866 act paying bounties to veteran volunteers.⁸²⁸ That July, over a year passed the end of the war, elite citizens were still fighting over the constitutionality of conscription. The

⁸²⁴ *Ibid.*, *6-8.

⁸²⁵ *Ibid.*, 166-67, citing *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853) In perhaps Chief Justice Black’s most important opinion, he established a strong presumption of constitutionality and judicial deference to the legislature, writing, “we can declare an Act of Assembly void, only when it violates the constitution *clearly, palpably, plainly*; and in such manner as to leave *no doubt* or hesitation on our minds.” 21 Pa. at 164. Lowrie dissented in *Sharpless* in an unpublished opinion. In *Speer*, Agnew used Black’s words against him.

⁸²⁶ *Speer*, 50 Pa. 179-180 (Thompson, J., concurring) Judge Thompson, joined by Chief Justice Woodward, argued in favor dual sovereignty, writing that, “I am altogether incapable of comprehending how two distinct wills can at the same time be exercised in relation to the same subject, and be effectual and at the same time compatible with each other.....The harmony of our complex yet simple system of government, is only to be preserved by a strict regard to the operation of its parts, within their assigned limits. A disregard of this will bring, and has brought on, collision between the parts, and will necessarily threaten the evils of discord and perhaps again war. ”

⁸²⁷ Thompson wrote that if states could do this,” it would justify state armies whenever the necessity for a national army should exist, and thus endanger the defeat of the Federal authority altogether....(when war was Congressionally waged) I cannot comprehend the right of a state to interfere, except in case of actual invasion; and then the interference must be for that purpose primarily, and not secondarily, or as a consequence to flow from want of success against the common enemy.” *Ibid.*, 178.

⁸²⁸ *Washington County v. Berwick*, 56 Pa. St. 466, 474 (1868) (upholding the constitutionality of the Bounty Act of 1866). *See also* *Ahl v. Gleim*, 52 Pa. 432 (1866) (upholding *Speer* and sustaining the power to pass the Bounty Law of 1864, with Woodward and Thompson dissenting). Notably, in an 1867, Judge Agnew, with Woodward and Thompson concurring, ruled that *Speer* and the cases which followed only applied to volunteers. *Guilford School District v. Zumbro*, 55 Pa. 432 (1867) (“A conscript, unlike a volunteer, enters the service compulsorily. There is no point in the progress of the draft where he can stop and say, I will not serve unless I obtain a bounty. In the absence of an express agreement, there is no ground upon which the law can imply his consent to serve for the offered reward. The decided cases applicable to volunteers do not govern this.”)

case of *Reilly v. Huber* involved a deserter Henry Reilly who failed to report in July 1864.

Congress's act of March 3, 1865 authorized the President to relieve deserters like Reilly from the penalty of death by proclamation if the deserter returned within a specified time to discharge the "manifest duty he owed to the government."⁸²⁹ If he deserted again and rejected the pardon, he would voluntarily forfeit his citizenship.

During oral argument, Republican Pennsylvania House Representative Alexander Kelly McClure, representing the government, eventually turned to the military powers of the federal government and revived arguments from the 1863 debates. A long-time party broker, McClure spent the 1863 election cycle referring to Democrats as "faithless to their country" and attacked Woodward as being "dangerous," even if he was able and intelligent, because he would throw Pennsylvania to its enemies.⁸³⁰ In a September 1863 speech, he noted that if an honest man believed that the Conscription Act was unconstitutional, he would "not resist now, in the face of the enemy," since it was a law of Congress created for the good of the country.⁸³¹ Before the Pennsylvania Supreme Court in 1866, McClure's argument sounded strikingly reminiscent of the one John Knox gave a few years earlier. McClure claimed that the "want of supreme power in the national government had been learned by bitter experience" by the framers. Thus, the right to "raise and support armies" was followed with the "sweeping delegation of power to make 'all laws which shall be necessary and proper'" in order to oppose "the pernicious doctrine of the

⁸²⁹ "The Disfranchisement of Deserters is the Act of Congress Constitutional? The case of *Reilly v. Huber* in the Supreme Court of Pennsylvania. Argument of A. K. McClure," *Franklin Repository*, July 4, 1866, 1; *Huber v. Reilly*, 53 Pa. 112 (1866).

⁸³⁰ "The City: Spirited Meeting in the Tenth Ward," *Philadelphia Press*, September 12, 1863, 2. (McClure pointed to Woodward's infamous 1860 Independence Hall speech as evidence that he was disloyal and never supported the war)

⁸³¹ *Ibid.* McClure also noted that it was of "no violence to the Constitution to exercise every power necessary for its preservation" and accused the Democrats of declaring against *every* measure adopted to sustain the government and tried "every means....short of invasion" to stop the government.

supreme sovereignty of the states.”⁸³² The power to “raise and support armies” had only one express limitation, which prevent the appropriation of money to support armies for longer than two years.⁸³³ Notably, McClure felt that constitutional tradition evidenced no valid limitation on Congress’s *means* of exercising its constitutional war powers. Simply because the government since its inception had yet to have an occasion to exercise its “extreme powers,” it was no reason to “hesitate to sanction them” during the Civil War.⁸³⁴ Raising armies meant more than calling for a specific number of troops or a quota and when facing armed insurrection, Congress needed to be able to enforce obedience to its call for volunteers or conscripts.

Chief Justice George Woodward now saw his opportunity to rehabilitate *Kneedler I*. He interrupted McClure, chastising him that the country had never had any conscription law in its history previously. McClure snapped back that if that was true, then the people had “conscripted themselves without law” and while there was no “general government empowered to make such a law,” conscription was still enforced during the Revolution. Woodward and McClure jostled back and forth as to whether drafts were made during the Revolution and War of 1812.⁸³⁵

Woodward thought it was uncertain that the people ever delegated the power to conscript.

McClure responded that this was not done expressly, but because the states had raised armies by

⁸³² “The Disfranchisement of Deserters,” *Franklin Repository*, July 4, 1866, 1 The confederation was a “national suicide,” its powers “were but the instruments of death in time of peril” and it was “powerless to maintain its own existence...”

⁸³³ *Ibid* Outside this limitation, McClure noted the power to raise armies was exclusively vested in Congress and there were no “unwarrantable” exercises of the power unless another constitutional provision was violated.

⁸³⁴ *Ibid*. McClure also attacked states’ rights constitutionalism, claiming that the men who conceived of the rebellion had for years tried to limit the powers of the national government by “insisting upon constructions of our organic law” that would make it an “instrument of death.”

⁸³⁵ *Ibid*. Justice Thompson interjected that while there was no federal draft, states did draft in 1812. At this point, the court was given an original copy of the call for volunteers by Pennsylvania Governor Simon Snyder during the War of 1812, which ordered a draft for counties that failed to fill their quotas. McClure argued that under the Articles of Confederation, states did resort to conscription under this system and after exercising the power to conscript, the people delegated the power to Congress under the Constitution within the power to “raise armies” without limitation.

conscription when the power belonged to them and with “conscription and war were still fresh in their recollections,” they “parted with the entire power” without reserving any rights. To Woodward, even if the people and the states had the power to conscript and delegated certain powers to the national government, it did not necessarily follow that they delegated the power to conscript.

Justice Strong interjected that he “scarcely” thought this discussion was “relevant to the question at issue.” McClure admitted that the question had been raised by the court, but he had “no desire to pursue it” since it was “needless to discuss the constitutional power of the government to raise armies by conscription” given that the Court had already ruled the Conscription Act constitutional in *Kneedler II*. Woodward explicitly denied this was true, saying that the “constitutionality of the conscription law was never affirmed by this court.”⁸³⁶ McClure was perplexed. He responded that the case report he had which purported to be the opinion of the court and its final judgment affirmed the constitutionality of the Conscription Law in “the clearest terms.” Justice Reed agreed that the court had certainly asserted the constitutionality of the Conscription Act, but the intransigent Woodward again denied this, saying that “on the contrary,” the court had decided the act unconstitutional “in regular form.”⁸³⁷ Strong dismissed Woodward’s pleas, stating once again that the court had already decided in favor of the Constitution Act and imploring McClure to proceed with his argument. Ultimately, the debate over conscription was superfluous. The court found Congress’s March 1865 act constitutional but allowed Reilly to vote on the grounds he had not been convicted as a deserter.⁸³⁸ Yet, *Reilly* reflects the degree to which even three years later, the Pennsylvania Supreme Court revealed the

⁸³⁶ *Ibid.*

⁸³⁷ *Ibid.*

⁸³⁸ Huber v. Reilly, 53 Pa. 121.

high stakes of the 1863 constitutional debate over conscription. The justices understood that *Kneedler*, with no Supreme Court resolution, was the most significant conscription case because other courts would look to it for its precedential value. Both supporters and detractors needed to ensure in the record that their side had won out in the debate and Woodward forcefully maintained that *Kneedler I* remained good law never properly overruled. Even once he left the Pennsylvania Supreme Court in 1867 for Congress, the battle still seemed on his mind as he introduced a bill in 1868 to test the constitutionality of “questionable acts of Congress.”⁸³⁹ The battle lingered on.

The Continued Fight over Ableman in New York

Unlike the judges of Pennsylvania, New York judges did little to revisit the 1863 judicial battles over conscription. When it did come up before Judge John McCunn in 1871, the only remaining issue was the removal provision in the act intended to give federal officers the protection of the federal courts. McCunn, the same city judge who found conscription unconstitutional in 1863, sidestepped the issue and dismissed it on jurisdictional grounds. Yet, in other post-war cases, the jurisdictional fights over the meaning of *Ableman* and the extent of concurrent state court jurisdiction of *habeas* cases never quelled.

With some New York state judges still fighting to claim that *Ableman* did not restrict their *habeas* jurisdiction, they found support in a single federal district judge. Judge Hall, who wrote an opinion in late 1862 suggesting state courts had concurrent jurisdiction, upheld it again

⁸³⁹ See Journal of the House of Representatives, 1867-1868, 40th Congress, 3rd Session, 616 (April 13, 1868). Woodward would end his fifteen-year term in 1867 and was thereafter elected to Congress as a Democrat to replace the deceased Charles Dennison, serving until March 1871. In Congress, Woodward began a rapid opponent of black suffrage, stating in a February 1869 speech against the Fifteenth Amendment that the Pennsylvania Constitution of 1790 did not recognize negro suffrage because the “negro race had never become part of the social compact of this country” and a “subject, inferior, ignorant and idolatrous race” did not consent to be governed under American law. *Congressional Globe*, 40th Congress, 3rd Session, 205. He maintained that states properly held power over suffrage and to grant negro suffrage would make Americans the first great people in world history to surrender political trust to one of the “lowest and feeblest races of the world’s population.” *Ibid*, 207.

in 1867 in *In Re Reynolds*. In a case of alleged desertion, the government argued that state court Judge Lamont had no jurisdiction. Hall concluded that Lamont's decision in favor of state jurisdiction had no effect on the proceedings in federal court.⁸⁴⁰ On the question of state court jurisdiction, Hall wrote that for decades before *Ableman*, doctrine was well-settled in favor of state court jurisdiction, as the general government tacitly conceded and recognized this jurisdiction was "constantly exercised by state courts."⁸⁴¹ He noted that in his own service as a state court judge, he frequently released minor soldiers on writs of *habeas corpus* and he knew other state judges to do the same. Hall cited state court precedent from 1808 up to 1860 from Georgia, Virginia, Massachusetts, New Hampshire, New York, Pennsylvania, Indiana, Ohio, Wisconsin and Maryland.⁸⁴² He disregarded Judge Smith's opinion in *Jordan* and Bacon's in *Hopson* denying state court jurisdiction by citing Judge Leonard's opinion in *Barrett* and noting that Bacon's colleague Judge Mullin disagreed with *Hopson* in "an elaborate and able opinion" in *Bailey's Case*.⁸⁴³

Hall understood many of the contrasting state court precedents not as denials of concurrent jurisdiction, but rather as reflective of careful examinations of the facts in each

⁸⁴⁰ *In Re Reynolds*, 20 F. Cas. 592, 594 (N.D. N.Y. 1867). The 1862 case was *In Re Benedict*.

⁸⁴¹ *Ibid.* The government cited 28 cases denying state court jurisdiction, starting with the opinions of Justice Radcliffe and Chancellor Kent in *Husted's Case* and *In Re Ferguson*. Hall argued that *Husted's Case* was not an authority against state court jurisdiction, since the writ was denied on the merits, and that Chancellor Kent in his *Commentaries* accepted the broad consensus in favor of concurrent state court jurisdiction. He also cited Attorney General Caleb Cushing 1853 opinion that as applied to United States enlistment, was "definitely settled, so far as a long series of the decisions of the states can go" in favor of state court jurisdiction. *Ibid.*, 596.

⁸⁴² Citing *In Re Stacy*, 10 Johns. 328 (N.Y. 1813); *Com. v. Cushing*, 11 Mass. 67 (Mass. 1814); *In Re Carlton*, 7 Cow. 471 (N.Y. 1827); *State v. Dimick*, 12 N.H. 194 (N.H. 1841); *Com. v. Fox*, 7 Pa. St. 336 (Pa. 1847); *Sim's Case*, 7 Cush. 285 (Mass. 1851). Hall writes that Chief Justice Shaw and his associates did not deny jurisdiction, but rather in holding the Fugitive Slave Act constitutional, concluded the petitioner slave was lawfully held under federal process; *Collier's Case*, 6 Ohio St. 55 (Oh. 1856); *Ex Parte Bushnell*, 9 Oh. State 77 (Oh. 1859); *In Re Kemp*, 16 Wisc. 382 (Wisc. 1863); *In Re Barrett*, 42 Barb. 479 (N.Y. 1863); *In Re Beswick*, 25 How. Prac. 149 (N.Y. 1863); *People v. Gaul*, 44 Barb. 98 (N.Y. 1865); *Skeen v. Monkeimer*, 21 Ind. 1; *Martin's Case*, 45 Barb. 143.

⁸⁴³ *In Re Reynolds*, 1867 U.S. Dist. 597.

showing that the petitioners were lawfully held in federal custody.⁸⁴⁴ He also understood that *Ableman* had been relied upon during the Civil War to deny the rightful authority of state courts and judges in enlistment cases.⁸⁴⁵ But Hall believed Taney's opinion had to be understood according to its facts. Because the Wisconsin Supreme Court ignored both Supreme Court precedent and numerous state court decisions in finding the Fugitive Slave Act unconstitutional, Taney saw its actions as a "gross and wanton violation of the Constitution."⁸⁴⁶ Additionally, Hall thought Taney's ruling understood "judicially apprised of lawful federal authority" to be a matter of fact and law. It did not create a presumption absent legal proof that a prisoner was under federal authority.⁸⁴⁷ State court judges could still properly inquire into the *cause* and *authority* by which prisoners were held within their territorial limits. Finally, Hall found that under New York law, inquiries into detention only ended "when it is shown that they are detained by process issued by a court or judge of the United States in a case where such court or judge has exclusive jurisdiction."⁸⁴⁸ Hall still thought in 1867 that the consensus favored concurrent jurisdiction, doubting that *Ableman* could have so drastically restricted state courts. He was not alone.

⁸⁴⁴ For instance, Hall understood Justice Nelson's 1851 grand jury charge similarly—Nelson did not deny state court jurisdiction when imprisonment was unlawful—and interpreted Justice McLean's opinion in *Norris v. Newton* as arguing state court jurisdiction was *limited* to causes of detention without a showing of federal authority.

⁸⁴⁵ *Ibid.*, 601. Hall later remarks that "lately it has been claimed" that *Ableman* meant a state court had "no authority to inquire into the truth of the facts alleged in a return to a writ of *habeas corpus*, or to decide upon their legal effect" and thus no power to inquire into whether a person claimed and held as a soldier has ever enlisted or if their enlistment is illegal and void. *Ibid.*, 605.

⁸⁴⁶ *Ibid.*, 602. Hall suggested that the decision of the Wisconsin court, which declared the fugitive slave act unconstitutional and void, was "in direct conflict with repeated and well-known decisions of the supreme court of the United States, and with decisions of many state courts of eminent learning and of the highest authority; and it was unsupported by a single prior decision of the supreme or superior court of any state." Thus, Taney may have wanted to punish the Wisconsin court, but Hall would not presume that Taney intended to overrule the numerous state court precedents and strike down "by a single blow a jurisdiction which had been uninterruptedly exercised by state courts and judges for more than thirty years." *Ibid.*, at 604.

⁸⁴⁷ *Ibid.*, at 603. The term "judicially apprised" could "be for no other purpose than to show that the facts must be established in such a legal manner as to make them proper subjects of judicial cognizance and action....it can be scarcely doubted (Taney) must be understood to mean that until the person who holds the prisoner in custody exhibits the authority," or proves the fact under which the authority rests, and if he fails, the power of the state court is "unquestionable."

⁸⁴⁸ *Ibid.*, at 612. The New York *habeas* statute required judges to grant the writ to *all* persons restrained of liberty under *any* pretense whatsoever unless they be detained by virtue of "process from any court or judge of the

The same year, the New York Supreme Court reviewed the *habeas* petition of Owen O'Connor, who sued Major General Daniel Butterfield on behalf of his son John O'Connor, claiming John was a minor at the time of enlistment. He appealed the denial of his motion before Judge Leonard, Clerke and Ingraham. Leonard, who previously upheld state court jurisdiction in *Barrett*, found himself in dissent of Ingraham's denial of jurisdiction. Ingraham found that the Congressional acts of 1862 and 1864 granting the Secretary of War authority to discharge enlisted minors preempted state court jurisdiction. Ingraham noted that before these acts, state court judges *might* have exercised jurisdiction.⁸⁴⁹ Leonard vehemently disagreed, noting as he had in *Barrett* that the weight of authority was in favor of state court concurrent jurisdiction in cases where the prisoner is not held by the process of a federal court.⁸⁵⁰ He reiterated that the basis for denial of state court jurisdiction as argued by the government's attorneys still rested on *Ableman* and Bacon's understanding of Taney's opinion in *Hopson*.

Leonard emphasized that *Ableman* dealt with two cases affecting the same party, one under process of a federal commissioner and the other upon conviction of a federal court. Agreeing with Hall, he argued Taney's decision had to be understood with reference to the facts before him.⁸⁵¹ Thus, if a prisoner was arrested by a federal officer on criminal charges *without* any process, it would not preclude a state court or judge from discharging the prisoner not held by authority of law.⁸⁵² The acts of 1862 and 1864 was not different from previous authority granted to state judges to discharge minors enlisted without consent of their parents. Otherwise,

United States, having exclusive jurisdiction in the case" or by virtue of a final judgment or decree from "any competent tribunal of civil or criminal jurisdiction."

⁸⁴⁹ In Re Connor, 48 Barb. 258, 260 (N.Y. 1867).

⁸⁵⁰ *Ibid.*, 261 (J. Leonard, dissenting) Citing In Re Stacy, 10 John. 328, In Re Metzger, 1 Barb. S.C. Rep. 248, In Re Dobbs, 21 How. Pr. 68, In Re Webb, 24 How. Pr. 247.

⁸⁵¹ In Re Connor, 48 Barb. 262.

⁸⁵² *Ibid.* Leonard pleaded that it was time that *Ableman*'s citation as an "authority to uphold acts done without the authority of any law, state or national, should cease.."

Leonard felt Congress would be given complete jurisdiction over the whole subject matter involved in the enlistment of soldiers.⁸⁵³ He concluded by admonishing his colleagues for ignoring the authority of New York law and precedent in favor of the “new and sole advice” of one federal judge, as there was “no sufficient reason” to refuse jurisdiction.⁸⁵⁴ Leonard remained certain that state courts held concurrent jurisdiction. Between both New York federal and state courts, consensus on state court *habeas* jurisdiction seemed no clearer than it was in 1863.

Yet, by 1871, the sands were shifting. Now on the Superior Court, Judge McCunn, the much-derided Tammany Hall judge who had overturned conscription in the New York City in 1863, sidestepped an opportunity to give a robust defense of state court jurisdiction. In *Mitchell v. Dix*, the petitioner challenged the removal provisions both of the March 1863 Conscription Act and the May 1866 amended Enrollment Act in an action for false imprisonment and trespass against a federal officer. Mitchell’s attorney Roger Page argued that both the 1863 and 1866 acts were unconstitutional because they conferred exclusive jurisdiction in the federal courts in cases in which state courts held concurrent, if not sole jurisdiction. Notably, Page cited multiple Pennsylvania cases for this proposition, looking to not only *Kneedler*, but Lowrie’s opinion in *Commonwealth v. Wright* and Judge Ryon’s in *Bressler*.⁸⁵⁵ McCunn demurred, deciding that he did not have the authority to rule on the merits. The acts provided removal *during* the rebellion and the petitioner’s arrest occurred on June 14, 1865. As a matter of judgment, McCunn ruled that by June 14, the rebellion had ceased with the Confederate government annihilated with “its authority everywhere overthrown; its armies dispersed or surrendered; its resources and its

⁸⁵³ *Ibid.*, 264 Such an interpretation would transfer “wholly from the cognizance of the judiciary to the department of war the *exclusive charge* of the pecuniary rights and status of minor recruits in the army.”

⁸⁵⁴ *Ibid.*, 265-66.

⁸⁵⁵ *Mitchell v. Dix*, 42 How. Pr. 475, 476-77 (N.Y. Sup. Ct. 1871). He also pointed out that while Justice Strong supported the removal provision in *Hodgson v. Millward*, he also held that the burden was on the petitioner to make an affirmative case for removal. *Hodgson v. Millward*, 3 Grant’s Cases, 415 (1863).

territory all in the possession of the federal forces; the power and dominion of the Union re-asserted and established.”⁸⁵⁶ It seems that at least for McCunn, the matter of state *habeas* jurisdiction had been tried and won by the war.

Tarble’s Case: Establishing Federal Judicial Supremacy

According to mid-nineteenth-century doctrine, Judges Hall and Leonard were not without ample support in suggesting that in the post-*Ableman*, postwar world, state courts could still take *habeas*-based challenges to federal authority. At least one legal contemporary encyclopedia claimed that until 1871, *generally*, state courts were believed to have jurisdiction on writs of *habeas corpus* to release soldiers who were illegally enlisted.⁸⁵⁷ Even twenty years later, the 1891 edition of the American and English Encyclopaedia of Law cited cases from New York, including *Husted’s Case*, *Ferguson’s Case*, *Carlton’s Case*, and *United States v. Wyngall* as well as Pennsylvania cases, such as *Lockington’s Case*, *Com v. Callan*, and *Com v. Fox*.⁸⁵⁸ Even by 1871, Judge Horace Gray of Massachusetts—who would soon sit on the Supreme Court—could comfortably state that, “The jurisdiction of the state courts to discharge upon writ of *habeas corpus* minors illegally enlisted into the army of the United States is too well settled, by the concurrent opinions of the highest judicial authorities that have had occasion to pass upon it, and by a practice of more than half a century in accordance therewith, to be now disavowed, unless

⁸⁵⁶ *Mitchell v. Dix*, 42 How. Pr. 477.

⁸⁵⁷ *The American and English Encyclopaedia of Law: Mechanics’ liens to Municipal Vol. XV*. ed. John Huston Merrill (Long Island: Edward Thompson Co., 1891), 407-408. The encyclopedia entry suggested that it was the experience during the Civil War during “times of great popular excitement, there may be found in every state large numbers anxious and ready to embarrass the operations of the government” and the writ was used in states as such to the “great detriment of public service” in state courts.

⁸⁵⁸ See *Husted’s Case*, 1 Johns. Cas. 136 (N.Y.); *Ferguson’s Case*, 9 Johns. 239 (N.Y.); *Carlton’s Case*, 7 Cow. 471 (N.Y.); *United States v. Wyngall*, 5 Hill 16 (N.Y.); *Lockington’s Case*, Brightly 269 (Pa.); *Com v. Callan*, 6 Binn. 255 (Pa.); *Com v. Camac*, 1 S & R. 87 (Pa.); *Com v. Fox*, 7 Pa. St. 336 (Pa.); *Com. v. Wright*, 3 Grant. 437 (Pa.). The American and English Encyclopaedia of Law also refers to contemporary cases from Connecticut, Ohio, Wisconsin, New Hampshire and Massachusetts. See *Sanborn v. Carleton*, 15 Gray 399 (Mass.); *Lanahan v. Birge*, 30 Conn. 438 (Conn.); *In Re Disinger*, 12 Ohio State 256 (Oh.); *Higgins’ Case*, 16 Wis. 351 (Wis.); *State v. Dimick*, 12 N.H. 194 (N.H.).

in obedience to an express act of congress, or to a direct adjudication of the supreme court of the United States.”⁸⁵⁹ The line of delineation did not come with *Ableman* or any Civil War case, but the 1872 Supreme Court case of *Tarble’s Case*.⁸⁶⁰ Once again, the case came out of Wisconsin, after a Dane County citizen Edward Tarble enlisted in 1869 and his father sued for a writ to release his minor son from federal custody.⁸⁶¹

Justice Stephen Field’s March 1872 opinion aimed to answer the question state courts had been fighting throughout the Civil War period: Did any state judicial officer have jurisdiction, upon *habeas corpus*, to inquire into the validity of the enlistment of soldiers into the military service of the United States and to discharge them from such service when in his judgment their enlistment has not been made in conformity with the laws of the United States.⁸⁶² Field held that state courts held no jurisdiction to discharge soldiers on *habeas* petitions since the national government held the power to “raise and support armies” and to regulate the “land naval forces.” He made apparent that although the question was not before the court, national conscription was authorized under those powers and state courts could not act to halt it.⁸⁶³ In fact, Field surmised that *habeas* petitions in state courts examining the validity of enlistment were so dangerous they could harm even troop movement. He found that the Civil War showed in times of “great popular excitement,” states could have “large numbers ready and anxious to

⁸⁵⁹ *McConologue’s Case*, 107 Mass. 154, 160 (Mass. 1871). The existence of this power in the state courts has never been denied by the supreme court of the United States, nor, so far as we are informed, by any judge of that court.” *Ibid.*, at 166.) Gray notably did not find the other New York precedents affirming *Ableman*’s denial of state court jurisdiction, like *O’Connor*, to be controlling precedent.

⁸⁶⁰ *Tarble’s Case*, 13 U.S. 397 (1871).

⁸⁶¹ *Ibid.*, 397-398.

⁸⁶² *Ibid.*, 402.

⁸⁶³ *Ibid.* The federal government could determine “without any question from any state authority” how armies would be raised, “whether by voluntary enlistment or forced draft” and state officials could not interfere with the execution of this power without impairing its efficiency by threatening to “utterly destroy this branch of the public service.”

embarrass the operations of the government” by using *habeas* writs to the “great detriment of the public service.”⁸⁶⁴

Ultimately, Field reasoned that *Ableman* was meant to avoid such a clash of jurisdictions. If state courts held the power claimed by Wisconsin’s Supreme Court in *Ableman*, “no offense against the laws of the United States could be punished by their own tribunals without the permission and according to the judgment of the courts of the state in which the parties happen to be imprisoned.”⁸⁶⁵ Thus, although state judges and state courts under state law undoubtedly held the right to issue the writ in any case where a party was allegedly illegally confined within their limits, this did not extend to prisoners confined under federal authority.⁸⁶⁶

Perhaps the most remarkable footnote to *Tarble’s Case* is the brief dissent of Chief Justice Salmon Chase. During the September 1863 Lincoln Administration cabinet meetings, he took the position that state courts had the right under precedent to issue writs of *habeas corpus* against federal officers to inquire into the underlying federal authority. Chase had not changed his mind in the intervening nine years. He had “no doubt of the right of a state court to inquire into the jurisdiction of a federal court upon habeas corpus and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction.”⁸⁶⁷ If the state court erred in deciding the question of jurisdiction, the error was to be

⁸⁶⁴ *Ibid.*, 408-9 Field argues that even troop movements could be delayed or interfered with if state courts held jurisdiction over such cases. Field noted that the delay between bring a *habeas* case from the highest state tribunal to the Supreme Court while discharging soldiers would interfere with the energy and efficiency of the national government by allowing for another sovereignty’s tribunal to control.

⁸⁶⁵ *Ibid.*, 403. Further, Field thought Taney was right that “temporary supremacy” until federal judicial decisions could be had was “essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments.” *Ibid.*, 407.

⁸⁶⁶ *Ibid.*, 410-11. Field also addressed the disputed meaning of *Ableman* and the theory espoused by New York Judges Leonard and Hall that it was limited to its facts. It was evident to Field that Taney decided whenever it appeared to the judge or officer issuing the writ that the prisoner was held under undisputed lawful authority, he should proceed no further.

⁸⁶⁷ *Ibid.*, 412 (Chase, C.J., dissenting).

corrected under the 25th section of the Judiciary Act, not by denial of the right to make inquiry. Chase had “less doubt, if possible” that writs from state court could be used to inquire into the validity of imprisonment or detention by an officer of the United States when it did not interfere with the proceedings of another court. To dislodge state court jurisdiction was to “deny the right to protect the citizen by habeas corpus against arbitrary imprisonment in a large class of cases, and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution.”⁸⁶⁸ Chase’s dissent recognized the serious doctrinal arguments in favor of state court jurisdiction during the 1860s, but Field’s majority opinion sealed its fate.⁸⁶⁹ The end of the nineteenth century, especially with the passage of the landmark Jurisdiction and Removal Act of 1875, saw further erosion of the powers of state courts in favor of federal courts.⁸⁷⁰ By the time conscription was challenged constitutionality again during World War I, the judicial landscape was a remarkably different place.

Retrying the Constitutionality of Conscription during World War I

Over five decades after the Civil War, the constitutional and political landscape in America had notably shifted. The vibrant constitutional culture of the mid-nineteenth century had receded in favor of legal realism which rejected veneration for the founders’ Constitution.

⁸⁶⁸ *Ibid.*, 412-13 (Chase, C.J., dissenting) Citing the “express declaration” of Article I, Sec. IX, that “the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.”

⁸⁶⁹ Scholars have questioned the veracity of Field’s opinion. See Ann Woolhandler & Michael Collins, *The Story of Tarble’s Case: State Habeas and Federal Detention*, Federal Court Stories, 1 (2009) “Tarble’s conclusion is at odds with the general idea, accepted elsewhere in the Federal Courts canon, that state courts are not constitutionally disabled from hearing the same federal question cases that lower federal courts can hear. Scholars have taken the position that Tarble is wrong, or that it is better explained as an example of Congress’s having implicitly made exclusive its grant to lower federal courts of habeas jurisdiction to address unlawful federal detention.”

⁸⁷⁰ The act extended the jurisdiction of United States circuit courts to hear all disputes over \$500 arising under the federal Constitution and United States law and for plaintiffs to have a right to remove any disputes arising under federal law or where there was diversity of parties. “An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,” 18 *Statutes at Large* 470, March 3, 1875.

When President Woodrow Wilson and Congress declared war on Germany and its allies in April 1917, entering America into World War I, Congress almost immediately passed a national conscription act. The scale of the war and the act was immensely different from the Civil War. Seventy two percent of those who served during the war were drafted, an incredible 2.8 million men, far greater than the impact of the Civil War draft in either the North or the Confederacy.⁸⁷¹ 337,000 citizens drafted failed to report or deserted, while between 2.4 and 3.6 million evaded registration entirely compared to the 2.4 million who complied.⁸⁷² The passage of the Civil War amendments altered constitutional resistance to massive conscription during World War I. As legal historian William J. Ross notes, conscription “provoked profound constitutional questions,” especially given that the Thirteenth Amendment, adopted in 1865, prohibited involuntary servitude and the Constitution gave no explicit authority to “take people from their homes” and occupations and press them into military service.⁸⁷³ President Wilson, like Lincoln, downplayed the threat of conscription and claimed the central idea the policy was to “disturb the industrial and social structure of the country just as little as possible.”⁸⁷⁴

The conscription legislation enacted in April and May 1917 was based on a bill drafted by the War Department with Wilson’s support. The debates were contentious, and opposition came from those Midwestern and Southern representatives whom already opposed or questioned the war and feared that conscription was “unwarranted without any actual threat” to American security. Texas Democrat Atkins Jefferson McLemore argued that the “mad rush of so-called

⁸⁷¹ William J. Ross, *World War I and the American Constitution* (Cambridge: Cambridge University Press, 2017), 13.

⁸⁷² *Ibid.*, 31. The federal government had to hire “vigilantes” to apprehend draft evaders through “slacker raids” that caught at least 50,000 men.

⁸⁷³ *Ibid.* As Ross notes, conscription raised questions of federalism, separation of powers, due process, equal protection, and religious liberty and doubts about its constitutionality “cried out for prompt judicial resolution”

⁸⁷⁴ *Ibid.*, 15.

progressivism, our Constitution is regarded as an ancient document, merely designed for the period at which it was written” and that act create the showed that its “precepts have been trampled underfoot until today it is referred to often to create a laugh and sometimes a sneer.”⁸⁷⁵ Similarly, Wisconsin Senator Robert M. LaFollette, whom the *New York Times* considered the leader of the anti-war delegation, declaring conscription the “beginning of the end of our constitutional government” by permitting the president to force men into military service.⁸⁷⁶

Yet, these objections show that by 1917, constitutional conservatives had lost much of the ground on which to challenge conscription and were left with vague constitutional defenses alongside partisan responses. Constitutional resistance looked less like well-structured constitutional arguments aimed at preserving antebellum federalism than pleas to allow for any consideration of the Constitution’s limits on federal power. Most in Congress believed necessity was a sufficient constitutional justification for conscription and disagreement mostly came over whether or not Germany posed an actual threat to America’s security.⁸⁷⁷ Unlike the opposition in February 1863, there was no legislative success in 1917 and they were scoffed at as unprincipled obstructionists comparable to Clement Vallandigham.⁸⁷⁸ Compromise bills were rejected in both the House and the Senate. Wilson’s bill was breezily enacted, passing the House 397 to 24 and

⁸⁷⁵ 55 Congressional Record 1234, April 26, 1917.

⁸⁷⁶ 55 Cong. Rec. 1356, April 27, 1917; “The Obstructionists: Small Group of Senators and Congressmen Whose Tactics Encourage Enemy and Block War Plans,” *New York Times*, August 19, 1917 (LaFollette opposed every war measure and could not “see beyond Wisconsin,” like other obstructionists whom acted like “old-style, States’ Rights Democrats.”)

⁸⁷⁷ Ross, *World War I*, at 20. Thus, Representative Carl Hayden of Arizona argued conscription was both authorized by the Constitution and justified as necessary. George Sylvester Viereck argued that the Constitution clearly prohibited deploying the militia abroad but that Americans would accept a deviation from the plain language of the Constitution out of necessity. “Anti-Conscriptionists Lose First Skirmish,” *The American Weekly*, September 5, 1917.

⁸⁷⁸ “The Obstructionists: Small Group of Senators and Congressmen Whose Tactics Encourage Enemy and Block War Plans,” *New York Times*, August 17, 1917.

81 to 8 in the Senate. Draft resisters were left confused and outraged that the Congressional opposition had crumbled so easily.⁸⁷⁹

Most tests over the constitutionality of conscription in 1917 and 1918 came out of prosecutions for failing to register or abetting defiance of registration, generating 19 cases testing the draft.⁸⁸⁰ Opponents argued there was no constitutional basis for the draft and that it violated several specific Constitutional provisions, focusing on the same principles constitutional conservatives had in 1863—federalism, separation of powers, and personal liberties. Echoing 1863 arguments, 1917 draft opponents felt that conscription violated due process because the courts could not review the decisions of district draft boards improperly exercised Article III judicial authority. Opponents in 1917 also pushed federalism-based arguments that state officials could not be compelled to participate in administering a federal law. There were two crucial differences. For one, legal challenges to the 1917 draft emphasized violations of the Thirteenth Amendment’s ban on involuntary servitude. Two, opponents argued that conscripting state militia members for service in a national army abroad violated Article I, Section 8’s power to call for the militia only to “execute the Laws of the Union, suppress insurrections and repel invasions.”⁸⁸¹

⁸⁷⁹ John Chambers argued that the overwhelming support for conscription came “as quite a surprise” for the House, who pivoted like “a weather-vane in a windstorm” and completely reversed itself in a week. *See* John Chambers, *To Raise an Army*, 161. Ross suspects that Congressional members wished to protect their patriotic reputations and underestimated the size of the army to be raised. Congress moved the bill through with haste, omitting public hearings standard to major legislation, which exacerbated the public sense that powerful, interested persons were “foisting” conscription upon a divided public much as they maneuvered the nation into the war itself. Ross, *World War I and the American Constitution*, 17.

⁸⁸⁰ *Ibid.*, 35.

⁸⁸¹ Some of the evidence employed by 1917 opponents was familiar. They pointed to Daniel Webster’s opposition to Monroe’s proposed federal conscription during the War of 1812 which focused on the argument that Congress would not carry out its functions through compulsion, whether it was conscription or forced loans, as it would constitute a form of slavery. Opponents seemed unaware of the original *Kneedler* opinion or Chief Justice Taney’s unpublished opinion arguing against the constitutionality of conscription.

In 1917, the means by which soldiers and draftees challenged both their enlistment and the constitutionality of the underlying Selective Services Act had not changed much since 1863. Writs of *habeas corpus* were still filed claiming that enrollees were minors made soldiers without parental consent or foreign citizens who could not be made subject to the draft. The difference was that writs were now solely applied for in federal court and courts were much less sympathetic to the pleas of soldiers in 1917. One of the earliest cases came before the Eastern District of Michigan in July in *United States v. Sugar*. In a criminal indictment for conspiracy to commit an offense against the United States and conspiracy to defraud the United States, the defendant argued that the Conscription Act was unconstitutional. Judge Arthur J. Tuttle first addressed the Thirteenth Amendment. The *Slaughterhouse Cases* proved the Thirteenth Amendment was never intended to prevent, or to apply to, the rendition by an individual of duties to the government properly imposed by law.⁸⁸² Tuttle wrongly believed the amendment was only intended to apply to slavery and enforced labor by private individuals, not public duties such as juries and the militia.⁸⁸³ The defendants also maintained that the act deprived district courts of jurisdiction under Article III to review exemptions provided under the act which were solely given to the draft boards. Tuttle observed that this did not violate Article III because Congress granted the boards power under its Article I, Section VIII powers to create rules for the regulation of land and naval forces. Because the act fully and clearly provided the general means adopted for carrying out the purpose to temporarily increase the military presence of the United

⁸⁸² See *Slaughter-House Cases*, 83 U.S. 36, (1873).

⁸⁸³ *United States v. Sugar*, 243 F.423, 428-29 (E.D. Mich. 1917) (arguing that under the police power, states could traditionally enforce forced labor to repair highways and public ways). Tuttle also quickly dismissed the porous argument that the act was class legislation which violated the “Privileges or Immunities” clause of the Fourteenth Amendment given that the clause only applied to the states.

States, the powers conferred upon the President were “merely powers to regulate the details necessary to make practically effective the provisions of the act.”⁸⁸⁴

Finally, Tuttle addressed the argument that Congress was not granted the power to create and enforce compulsory military service. Under the “necessary and proper” clause and the rule of *McCulloch v. Maryland*, the federal government held all necessarily implied powers. It was “too plain for argument” to Tuttle that the power “to raise armies” was conferred in broad terms and “without the imposition of any limitations thereon, such power naturally involves the power to determine the means whereby such armies shall be raised.”⁸⁸⁵ He cited *McCall’s Case* and other Civil War authorities as upholding conscription under the logic of necessity and government self-preservation.⁸⁸⁶ Tuttle concluded by quoting extensively from Justice Read’s concurrence in *Kneedler II* upholding the Conscription Act, noting that the case presented “an exhaustive and able opinion the constitutionality of the Civil War Conscription Act was upheld, so fully and clearly expresses the principles applicable to this question.”⁸⁸⁷ As would become the pattern in World War I cases, *Kneedler* was cited without any of the full context of the case, treating it as proof that Civil War courts unanimously upheld the power to conscript.

⁸⁸⁴ *Ibid.*, 432. The defendant also claimed the President was improperly delegated legislative and judicial functions under the act because the executive could not only establish the boards but review their decisions. Tuttle admitted that Congress could not delegate such power, but it could grant authority to the executive to create rules and regulations to carry into effect what Congress has passed as law.

⁸⁸⁵ *Ibid.*, 435. Further, Tuttle asked whom would limit Congress is to be limited to certain specific means, how, and by whom, can it be determined what means Congress may adopt. (Further, even if the limits upon the means Congress could employ to “raise armies” was determinable, a power to raise armies without sufficient power to raise them would be a “misnomer, a self-contradiction, a legal farce.”)

⁸⁸⁶ *McCall’s Case* “The power to raise them by conscription may, at a crisis of extreme exigency, be indispensable to national security.” *In Re Griner*, 1 Wisc. 423 (1864) “The federal government is clothed with ample powers of self-preservation and self-defense, whether assailed by traitors at home or enemies abroad. Full authority in respect to the creation and direction of the national forces is conferred upon Congress.”; *Allen v. Colby*, 47 N.H. 544, 547 (1867) The grant of power to “raise armies” left “no doubt that Congress has power to make and authorize such orders and regulations as may be necessary to prevent those who are liable by law to military service from evading that duty.”

⁸⁸⁷ *Ibid* 436-37 (quoting *Kneedler v. Lane*, 45 Pa. 238, 311-14 (Read, J., concurring)).

Judge Emory Speer of the Southern District of Georgia dismissed a similar *habeas* challenge on behalf of two black conscripts who failed to register. The *New York Times* treated the case as the illegitimate mission of Thomas E. Watson, the attorney, one-time 1904 Presidential candidate of the People's Party and editor of *The Jeffersonian*, which he used to carry on a "furious campaign" against the draft. The *Times* described the case of Albert Jones and John Story that of two "negro slackers coached by Tom Watson."⁸⁸⁸ Story and Jones' core contention was the conscription conflicted with the Thirteenth Amendment, an argument Speer declared "abhorrent to the truth" and "degrading to that indispensable and gallant body of citizens trained in arms."⁸⁸⁹ Soldiers were not slaves. Speer was no more willing to consider Story and Jones' arguments that the Congress' Article I powers over the militia were limited and did not extent to conscripting citizens for duty in a foreign country. Congress' power to "raise armies" was plenary and not restricted in any manner, as decided by Justice Fields in *Tarble's Case*. States could not prevent Congress from the raising of armies by treating the national guard, which had effectively replaced the state militia, as a separate body that could not be conscripted. Finally, Speer thought the idea that Congress could not use the national army for offensive war in foreign territory ridiculous, finding that the "necessary and proper" clause was the "greatest reservoir of power to save the national existence" and reflective of the inherent powers of nation states.⁸⁹⁰

⁸⁸⁸ "Rules Draft is Constitutional. Judge Speer Denies Habeas Corpus to Georgians Who did not Register. Riddles 'Slavery' Charge. Tells Negro Slackers, Coached by Tom Watson, that Congress has right to send Conscripts Abroad," *New York Times*, August 21, 1917.

⁸⁸⁹ *Ibid.* Speer continued to say that the Grand Army of the Republic and the Sons of Confederate Veterans were not maintained to "preserve the tradition of slavery."

⁸⁹⁰ *Ibid.* Speer listed many key federal acts which were not based on express powers, from the Transcontinental Railroad, to federal criminal law, the Louisiana Purchase, and the construction of the Panama Canal, suggesting they were all done to further the general welfare.

By October and November, the consensus of the federal courts supporting conscription became evident. In October, the Second Circuit heard an appeal from a foreign citizen of Austria, John Angelus, who sought an injunction against three members of the local draft board in *Angelus v. Sullivan*, claiming that he was not subject to conscription because he had made no declaration of his intention to become a citizen.⁸⁹¹ He sued the District Board of New York City claiming they should have granted his exception. On appeal, Angelus argued that the Conscription Act was unconstitutional. The Second Circuit swiftly dismissed the argument, saying they had no doubt as to the act's constitutionality because Article I *expressly* granted "fully, completely, and unconditionally" the power to "raise and support" armies and to make rules and regulations for that army.⁸⁹² Judge Henry Wade Rogers argued that at the founding, conscription was "not an unknown mode of raising armies but had been resorted to by governments throughout the world."⁸⁹³ Citing *Kneedler* and *McCall's Case* among others, Rogers misleadingly claimed that all Northern and Southern courts upheld the validity of draft laws.⁸⁹⁴ Regardless, he felt the 1863 arguments that compulsory military service before and after the adoption of the Constitution was reserved to the states only "has always been regarded as extremely weak." As proof, Rogers looked to Lincoln's unpublished constitutional argument in favor of conscription, Secretary of War Henry Knox's 1790 plan for conscription, and Justice Field's opinion in *Tarble's*.⁸⁹⁵

⁸⁹¹ "Opinion Upholds Conscription Act and Government's Power to Raise an Army: Test by Austrian: Injunction Charging Court had Authority to Interfere in Board's Decision Dismissed," *New York Times*, October 23, 1917. John Sullivan, Edward Wagner, and Louis Aaronson were the named members of Local Draft Board 155.

⁸⁹² *Angelus v. Sullivan*, 246 F. 54, 57 (2nd Cir. 1917).

⁸⁹³ *Ibid.* Rodgers cites the examples of Virginia and New York's conscription during the Revolution, but this of course was recognized by constitutional conservatives in 1863, who argued that states, not the federal government, could do this.

⁸⁹⁴ *Ibid.*, 58. Citing Confederate cases as well without noting Chief Justice Pearson's notable denial of the constitutionality of conscription on the North Carolina Supreme Court.

⁸⁹⁵ *Ibid.* Quoting from *Tarble's Case*, "The execution of these powers falls within the line of its duties, and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how

As was typical of World War I cases, Thirteenth Amendment arguments that conscription amounted to forced labor were routinely and easily dismissed. Rogers that the Thirteenth Amendment was intended to end slavery and make peonage impossible, as held by the *Slaughterhouse Cases*.⁸⁹⁶ Significantly, in the 1915 case of *Butler v. Perry*, a state law requiring every able-bodied male person and resident over the age of 21 and under 45 to work on the roads and bridges of the county for six days and not less than ten hours in each year when summoned to do so. Justice McReynolds held in *Butler* that the Thirteenth Amendment created “no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc.”⁸⁹⁷ Because conscripts were not held in slavery or involuntary servitude, Rogers could not see how the Thirteenth Amendment was intended to withdraw from Congress the power to conscript. Ultimately, Rogers denied relief to Angelus because he ruled equity courts were not entitled to jurisdiction over criminal matters or offenses against the public peace of a political nature.⁸⁹⁸

Washington District Court Judge Jeremiah Neterer similarly dismissed constitutional arguments against conscription in *United States v. Olsen* in November. He briskly swept aside

the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned.” Tarble’s Case, 13 Wall. 408. Justice Harlan’s opinion in *Jacobson v. Massachusetts* confirmed Field’s view, saying a citizen “may be compelled by force, if need be, against his will, and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense.”

⁸⁹⁶ Angelus, 246 F. 59.

⁸⁹⁷ *Butler v. Perry*, 240 U.S. 328, 333 (1915).

⁸⁹⁸ Angelus, 246 F., at 66. Courts of equity could not interfere by injunction for the purpose of controlling the action of public officers constituting inferior quasi-judicial tribunals, on matters properly pertaining to their jurisdictions, and that they do not review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law by writ of certiorari.

the contention the act was unconstitutional as unfounded, as it ignored not only Congress's Article I military powers, but the power to "provide for the common defense and general welfare" and the President's Article II powers as "Commander-in-Chief" over the militia.⁸⁹⁹ Neterer recognized the distinction between the militia and regular army that constitutional conservatives constantly hemmed to. But he did not intend to take federalism-based objections to conscription seriously, nor did he believe that the fact that the Constitution did not explicitly grant the power to conscription to be significant. Rather, Neterer bluntly stated that the "liability of all inhabitants of the United States to be drafted into military service in time of war, it appears, cannot be questioned" and like Rogers, he found the validity of the Civil War draft acts was uniformly sustained in the north and south, citing both *Kneedler* and Judge Cadwalader's opinion in *McCall's Case*.⁹⁰⁰

Likewise, Delaware District Judge Edward Green Bradford II agreed federal power to raise armies as "unconditional, unqualified and absolute" with Congress as the exclusive judge of means.⁹⁰¹ Again, the clause providing for "calling forth the militia" was not a limit on Congress's power, as it was predicated upon the organization of the militia and applied only to the organized state militia.⁹⁰² Thus, Bradford argued it did not follow that Congress lacked power to organize the militia of the United States and "send it to any part of the globe deemed best for the conduct of military operations," as there was "no necessary or logical connection between the

⁸⁹⁹ United States v. Olson, 253 F. 233, 235 (W.D. Wash. 1917).

⁹⁰⁰ *Ibid.*, 236. Neterer cited precisely the same precedents as Rodgers without recognizing the finding of *Kneedler I* or noting that *McCall's* dealt with the Militia Act of 1862 primarily, whereas *Antrim's* took a direct challenge and upheld the Conscription Act.

⁹⁰¹ United States v. Stephens, 245 F. 956, 960 (D. Ct. D.C. 1917.).

⁹⁰² *Ibid.*, "The power of Congress to declare war and raise armies is absolute and paramount, and must be recognized, even if the exercise of the power interferes with the organization of the state militia in such manner as to leave no subject to which the inhibition can apply. That power infinitely transcends, in importance, the retention of organization of state militia with the result that it can be used for no useful purpose, except the accomplishment of the three specified objects within or substantially within the national domain."

two propositions.”⁹⁰³ The purpose of the Conscription Act was to raise an army and Bradford held no doubts about its constitutionality.

By the time the question reached the Supreme Court in the case of *Arver v. United States*, Chief Justice Edward Douglas White’s unanimous opinion seemed to rest on the existing consensus among lower courts. His ready dismissal of federalism-based constitutional arguments came despite the efforts of Joseph Arver’s attorneys—including Thomas Watson. In their brief before the Supreme Court, Arver’s attorneys exhausted both arguments from constitutional tradition and the federalism-based objections of Civil War constitutional conservatives. Their brief made use of ancient English history, noting that at the time the Constitution was adopted, there were two kinds of recognized military service in the English world—the militia and the standing army.⁹⁰⁴ There was a “great hostility” in England towards standing armies, while the militia could never be employed for foreign invasion.⁹⁰⁵ Arver argued that the same opposition to standing armies prevailed in America in 1787 and thus, the President was not given the power to raise and control the army. His case rested as much on older arguments about federalism and state sovereignty.⁹⁰⁶ Like earlier constitutional conservatives, he complained that the Conscription Act improperly delegated legislative power to the President and other officials to

⁹⁰³ *Ibid.*, 960-61. The circumstances of the war itself played a significant role for Bradford. The formal declaration of war against imperial Germany pledged “all the resources of the country,” meaning that the position taken by the defendant that, although an able-bodied American citizen of proper age, he had not given his consent and, therefore, could not be compelled to serve his country in a foreign field, or submit to registration, could not be maintained.

⁹⁰⁴ Gerhard Casper & Philip B. Kurland, ed., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law. Volume XVIII* (Arlington: University Publications of America, Inc., 1975), 582.

⁹⁰⁵ *Ibid.*, 583. The 1628 Petition of Rights included a grievance against the “oppressive use of the standing army by the King” and the 1689 Bill of Rights accused the King of “raising and keeping a standing army within his Kingdom in time of peace” without Parliamentary consent. Tudor Kings attempted to use conscription without success and Parliament made multiple attempts to pass conscription after 1688, but the only act to do so was limited to “idle and disorderly persons, who cannot, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment.”

⁹⁰⁶ He cited Chief Justice Marshall’s opinion in *Worcester v. Georgia* stating that while the powers granted to the federal government were limits on the states, with the except of the stated limitations, states were supreme in their sovereignty. *Ibid.*, 615.

raise an army. Citing Hamilton in *Federalist 24*, Arver aimed to show the framers did not intend the President to have kingly powers over the militia, declaring of war, or raising and regulating armies.⁹⁰⁷ It followed that the President, under Article II, was limited in his control over the militia to when the militia was in actual service of the United States.⁹⁰⁸

Arver believed that 127 years of legislation since the founding showed that the founders intended to raise the regular army by volunteer enlistment. The two exceptions to this were the failed attempt by Congress in 1814 and the Conscription Act in 1863 and he did not think conscription was properly established as a proper method of raising armies in either instance.⁹⁰⁹ Arver claimed that the question of the constitutionality of the Conscription Act was not determined by the federal courts during the Civil War, overlooking or missing Judge Cadwalader's decision in *Antrim's Case*. He noted that *Kneedler v. Lane* resulted in a grant of a preliminary injunction holding the act unconstitutional which was reversed upon the election of Justice Agnew. Arver argued that the elaborate opinions rendered by the individual judges were pertinent to the present case, especially Chief Justice Lowrie's contention that if Congress could conscript, it held power over all social, civil, and military organizations of the states.⁹¹⁰ He likewise referred to Woodward's contention that a careful study of the Constitution elicited no

⁹⁰⁷ *Ibid.*, 624. Arver also cites Daniel Webster once more, who opposed the Fortification Bill of 1835 which provided for \$3,000,000 for military and naval services under the President's direction, saying the proposition would endangering the "fabric of our free institutions." *Ibid.*, at 628.

⁹⁰⁸ *Ibid.*, at 595-96. Arver argues that the framers intent was emphasized by the report of the Committee of Detail as to the power to "call forth the militia," as the committee struck out the words "enforce treaties," leaving no doubt to Arver that the framers meant to clearly limit the power of Congress to service at home and "within the boundaries of the nation." Arver also cited Story's dissent in *Houston v. Moore*, in which he argued that it was "almost too plain for argument" that Congress's power over the militia was of a limited nature. *Houston v. Moore*, 5 U.S. 1, 51 (Story, J., dissenting).

⁹⁰⁹ *Ibid.*, 584-86 The brief quotes at length from Webster's speech, in which he asked where in the Constitution was power given to "take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in?" and that the power to raise armies meant by the "ordinary and usual" means and was not a grant of unlimited authority.

⁹¹⁰ *Ibid.*, 587. Arver also notes that Lowrie emphasized that by the Constitution's text, all forced contributions to the federal government, such as duties, imposts, excises and direct taxes, were fixed by the rule of uniformity, equality or proportion and that the text mentioned no such rules for contributions to the army.

intent to authorize raising armies by conscription under Article I, Section VIII. Arver peculiarly argued that the Act of 1917 ignored *Kneedler I* and for the first time in United States history attempted to provide for raising a regular army by conscription.⁹¹¹ His position was that *Kneedler I* remained useful, convincing precedent and that it was therefore apparent that Congress could neither conscript during a civil war nor use the militia for offensive war in a foreign nation. Significantly, he suggested that one distinguishing feature of the Civil War draft was the “high pitch of the public nerves” after the Conscription Act passed, as it “engendered terrific opposition” because theretofore such an act had been considered unconstitutional.⁹¹²

Here, Arver made his most notable argument, connecting the constitutional opposition to the draft with the meaning of the Thirteenth Amendment’s ban on involuntary servitude. He first argued that precedent showed that the executive could not hold persons in that capacity in a condition of involuntary servitude.⁹¹³ Arver concluded that there was substantial authority to show that the federal government could not permit as master and lawmaking forms of slavery or involuntary servitude. Because compulsory military service would essentially return to principles of feudalism and vassalage, it would violate the Thirteenth amendment.⁹¹⁴ Arver cited the opposition to conscription during the Civil War as evidence that conscription was “so clearly in the mind of the public and all bodies” proposing and voting on the amendment that had its

⁹¹¹ *Ibid.*, 590.

⁹¹² *Ibid.*, 607. Arver is clear too that this “high pitch of the public nerves” refers to both the public mood when the draft act was passed and the Thirteenth Amendment, “sweeping changes in policy.”

⁹¹³ *Ibid.*, 602-03. As Theodore Roosevelt’s Attorney General before ascending to the Supreme Court, William Moody judged the Panama Canal Commission unconstitutional, writing to the Secretary of War that “any such condition would be established by any officer of the United States is so inconceivable that it need receive no attention....any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude....”

⁹¹⁴ *Ibid.*, 604-06. Arver cites Justice Field’s dissent in *Slaughter-House* that the amendment covered the classes of peonage, serfage, villeinage, etc. because the amendment was “universal in its application” outside of for crime. Arver went on to say that voluntary military service was contractually based and if compulsion and force could be used to create that status, the “whole structure work of republicanism crashes to the ground” because conscription presupposed no consent by the parties. *Ibid.*, 613.

drafters intended to make an exception for conscription, they would have done so in the text.⁹¹⁵

The Thirteenth Amendment was evidence that even if Congress had the authority to raise an army by conscription, it lost that right under the prohibition against involuntary servitude.

Finally, if Congress could conscript, it could not delegate that power to the President, nor could the President require state officials to engage in raising the army, as such compulsion destroyed state sovereignty.

Applying this evidence to the May 1917 Conscription Act, Arver concluded that Congress could not conscript for purposes of a foreign war..⁹¹⁶ He pointed again to English and American constitutional tradition which held that militia could not be ordered out of their own country outside of “urgent necessity” and could be used only for internal defense.⁹¹⁷ Despite the long-term trend towards unfettered federal power to raise armies, Arver argued that this limitation was only recently the position of the federal government. In a 1912 memo, Attorney General George Wickersham found no power to use the militia in foreign warfare. Wickersham wrote that while the term “to repel invasion” might be “more elastic” in meaning, there was no “warrant (for use) of the militia for this purpose.”⁹¹⁸ Wickersham recognized that three exigencies listed in Article I were of “strictly domestic character,” limiting the use of the militia

⁹¹⁵ *Ibid.*, 609. Further, Arver contended that with the draft act, riots, and opposition “still fresh in their minds,” the framers of the Thirteenth Amendment pronounced that neither slavery *nor* involuntary servitude shall exist. *Ibid.*, 614.

⁹¹⁶ *Ibid.*, 593. According to the May 18, 1917 Act, the “existing emergency” was the state of war between the United States and Germany, not an insurrection or invasion.

⁹¹⁷ *Ibid.*, 594. Referring to Albert von Dicey’s 1895 treatise, the *Law of the Constitution*, where he wrote that the militia was a “constitutional force existing under the law of the land for the defense of the country—embodiment indeed converts the militia for the time being into a regular army, although an army which *cannot* be required to serve abroad.” In an *amicus brief*, two members of the Supreme Court bar, Hannis Taylor and Joseph E. Black, noted that English history showed that the militia could never be used to cross the channel for foreign invasions and that the framers adopted this principle that the power strongest for national defense and weakest for “purposes of foreign aggression.” *Ibid.*, 804.

⁹¹⁸ *Ibid.*, 597. Giving Congress such power would allow them to call out the militia to aid the civil power for the peaceful execution of the laws *wherever* such laws are in force using compulsion.

to the United States and its territories.⁹¹⁹ Arver's brief necessarily targeted the 1917 act's novel expansion of Congress's power to draft to include overseas offensive warfare, but it also harkened back to the 1863 constitutional conservative federalism-based objections. While the Thirteenth Amendment offered another constitutional basis to challenge conscription, Arver emphasized this was because among its original objectives was to include compulsory military service under "involuntary servitude." The brief showed hope that updating the traditional objections would still hold water in 1918, but the Supreme Court gave no quarter to any of the concerns Arver presented.

Chief Justice White treated the constitutionality of conscription as readily apparent. White accepted the Solicitor General's argument that courts had *uniformly* upheld conscription, citing *Kneedler* first and foremost among Civil War precedents. White scathingly dismissed the arguments against conscription, writing that, "As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not given power to provide for such men would seem to be too frivolous for further notice."⁹²⁰ White understood the argument as framing state citizenship as primary and dominant under the Constitution, a contention that "simply assails the wisdom of the framers of the Constitution in conferring authority on Congress, and in not retaining it as it was under the Articles of Confederation in the several States."⁹²¹

⁹¹⁹ *Ibid.*, 598. This was precisely because the Constitution recognized the militia as distinct from the regular army, made up of regular troops or volunteers, which could be used to invade a foreign country.

⁹²⁰ Selective Draft Law Cases, 245 U.S. 366, 377 (1918). In the Government's brief, *Kneedler* was cited positively by the government as holding that the power to declare war and to call the requisite force into service "inherently carries with it the power to coerce or draft" or else it would be a solecism. Casper & Kurland, *Landmark Briefs*, 661. *Kneedler* is cited as the single Northern case to hold the Conscription Act of 1863 to be a valid exercise of the power to raise armies. *Ibid.*, 681.

⁹²¹ Selective Draft Law Cases, 245 U.S. 377.

To White, Arver's argument willfully ignored the text's grant of power to Congress to raise armies. He was no more convinced by arguments from tradition that appealed to the volunteer, citizen soldier-based army and suggested that conscription was repugnant to free government and individual liberty. To White, the idea that the authority to raise armies was limited to volunteer soldiers was so "devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion." He pointed to Vattel and Blackstone, paragons of the founding generation, who spoke to the reciprocal obligations of citizens to render military service in times of need and cited the government's brief, which exhaustively listed all the world governments which used conscription.⁹²² White saw conscription as a long-accepted practice of civilized nations under their implicit war powers.

Like lower courts, White looked to English and colonial history for support. Before the Revolution, there was not the "slightest doubt that the right to enforce military service was unquestioned" as states enforced military service during the war.⁹²³ This argument ignored the fact that constitutional conservatives in the Civil War north never denied the power of states to compel service—they denied that the *federal* government could do so. For White, the two clauses—the power to raise armies and the power to call out the militia—did not speak to the reserved powers of states to maintain their militias, but rather the two combined powers

⁹²² The Government's brief cited the "Statesman's Yearbook for 1917," which listed all the nations which had conscription, from Argentina to Belgium to France, Germany, Italy, Norway, Russia, Spain, and Turkey, etc., and the Government noted separately the 1916 conscriptions of Britain and Canada. Casper & Kurland, *Landmark Briefs*, 665.

⁹²³ Selective Draft Law Cases, 245 U.S. 379-380. White also argued that nine state constitutions expressly sanctioned compelled military service, pointing to the Pennsylvania Constitution's clause, "That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." The government argued that a compulsory draft was a normal method of raising armies at the time the Constitution was adopted and that the history of the clause at the Constitutional Convention showed no intent to limit the power to voluntary enlistments. They noted that militia duty was imposed on all arms-bearing citizens of the original thirteen states and was used by the Continental Congress to recruit for the Continental Army using state quotas. Casper & Kurland, *Landmark Briefs*, 668-69.

delegated to Congress all governmental power on the subject, giving it complete authority. It was the states which were expressly limited in their powers, not the federal government. What was left to the states was the undelegated the control of the militia to the extent that such control was not removed by Congress's power to raise armies.⁹²⁴ When called, the militia was under the dominant authority of the federal government.

In considering the history of nineteenth-century conscription, White mostly ignored constitutional opposition. He likewise disregarded opposition during the War of 1812, saying that "we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of."⁹²⁵ White saw Monroe's proposed bill as good precedent and viewed the 1863 Conscription Act as following suit by making citizens subject to be called by compulsory draft into a national army according to the President's discretion.⁹²⁶ Under the Civil War legislation, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore national as distinct from the call into active service of the militia as such. Discussing *Kneedler*, White accepted the government's finding that *Kneedler* was the only case where the "constitutionality of the Act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment."⁹²⁷ The

⁹²⁴ Selected Draft Law Cases, 245 U.S. 383. This did not "diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared."

⁹²⁵ *Ibid.*, 385.

⁹²⁶ *Ibid.*, 386.

⁹²⁷ *Ibid.*, 388. White cited the same Confederate precedents as lower courts, also discounting the finding by North Carolina Chief Justice Pearson that the Confederate conscription, as amended in December 1863 to abolish substitutions, was unconstitutional—a conclusion a few lower state courts agreed with. See G. Edward White, "Recovering the Legal History of the Confederacy," 68 *Washington & Lee Law Review* (2011), 544. In so doing, White obscured both the first hearing in *Kneedler* finding the statute unconstitutional as well as the contested nature of the second hearing which upheld the act. And much as Justice Strong, Read, and Agnew upheld conscription on a

conclusion that the act was constitutional was “inevitable” to White, following both from constitutional history, the text, and the policies of other nations.

White was also unmoved by the notion that conscription for purposes of foreign service was constitutionally significant. He quickly discounted the remaining arguments that the act violated the First and Thirteenth Amendments and that it was an improper delegation of legislative and judicial power. These were too wanting in merit and unsound to require further notice. With relative alacrity, White has found constitutional opposition to conscription entirely lacking. In the space of over five decades, the battle conditions had changed significantly. Involved in a foreign war with demands for millions of men within the year and a global environment which embraced conscription, the federalism-based objections of nineteenth-century constitutional conservatives seemed passé. While World War I plaintiffs still used these constitutional conservative arguments to attack conscription, there was no *Kneedler* or Judge McCunn in 1918. No longer was this a fraught battle—it was now a full rout and it would be another five decades before anyone else tried to revisit the unconstitutionality of conscription in federal court.

Months later, the Supreme Court confirmed *Arver* in *Cox v. Wood*, with White again writing for a unanimous court. The petitioner argued that under Article I, while Congress could conscript citizens, it was limited to the purposes stated in Section XIII—“To execute the laws of the Union, suppress insurrections and repel invasions.” Thus, it was illegal for Congress to call the militia out for purposes of service in a foreign country. White declared that the *Selective Service Cases* made clear that Congress had power to compel military service and it was the duty of the citizen to render it when called for, these powers were not qualified or restricted by the

broad theory of federal power, it was not as expansive as White’s conception and it also rested on Marshall’s interpretation of “Necessary and Proper” in *Gibbons v. Ogden*.

provisions of the militia clause, and the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate provision.⁹²⁸

The rest of the twentieth century tells a story of continued constitutional resistance to conscription, but increasing, the reluctance of the courts to treat those arguments seriously as they had during the Civil War. In 1940, before the United States entered World War I, two defendants caught evading the peacetime draft under the Selective Service and Training Act of 1940 moved that peacetime conscription was unconstitutional. In *United States v. Cornell*, Idaho Federal District Judge Cavanah found that history and precedent uniformly recognized the constitutional power of Congress “to compel military service of a citizen in case of need, when it so declares, whether in peace time or war time, and to make preparation, if Congress declares that it is imperative or necessary, or that an emergency exists requiring the raising and support of an army.”⁹²⁹ White’s opinion in the *Selected Draft Law Service Cases* made it clear that the power to “raise armies” was without any limitation as to whether in war time or peace time. Cavanah concluded that *Sugar* and *Kneedler* before it proved that the Constitution must be construed as a whole and “where a grant of power is vested in plain language without exception or limitation such power should not be crippled by interpolating a limitation.”⁹³⁰ There was simply no room for the kind of strict constructionism which held sway in 1863 in 1940.⁹³¹

⁹²⁸ Cox v. Wood, 247 U.S. 3, 6 (1918).

⁹²⁹ United States v. Cornell, 36 F.Supp. 81, 83 (Id. 1940).

⁹³⁰ *Ibid.*, 84 The conclusion that the power to conscript was incidental to the power to “raise armies” was “irresistible.”

⁹³¹ Other courts similarly upheld peacetime conscription. See *United States v. Garst*, 39 F. Supp. 367, 237-68 (E.D. Pa. 1941) Pointing to *Tarble’s Case*, the 1790 Rhode Island Convention proposal, and Hamilton’s *Federalist 24* as evidence that the founders intended the power to “raise and support armies” to include conscription in times of peace; *United States v. Rappeport*, 36 F. Supp. 915, 916 (S.D.N.Y. 1941) “It cannot be assumed that the

Thereafter, courts confirmed the logic of the World War I precedents and dismissed the argument that the Thirteenth Amendment was an obstacle to conscription.⁹³² And as Judge Goodrich wrote in *United States v. Lambert*, the Supreme Court in *Arver* settled the question of whether the power to “raise and support armies” allowed Congress to implement compulsory service.⁹³³ Challenges to the Selective Services Act of 1948 were no more successful.⁹³⁴

By the time of Vietnam, constitutional arguments against conscription were out of vogue amongst the judiciary. Leon Friedman and the ACLU made a valorous effort over the course of years to bring a challenge to the Supreme Court, but in 1968 in *United States v. O’Brien*, Chief Justice Earl Warren wrote that “The power of Congress to classify and conscript manpower for military service is *beyond question*.”⁹³⁵ Under this power, Congress could establish a system of registration for individuals liable for training and service and require such individuals “within reason to cooperate in the registration system.” This would not stop challenges to conscription, but the rejection by the courts became more summary over time. In 1970, the Eighth Circuit

Constitution intended to prevent the raising of an army by voluntary enlistment or conscription until war has been declared or actually begun.”

⁹³² See *Heflin v. Sanford*, 142 F.2d. 798, 799-800 (5th Cir. 1944) “The Thirteenth Amendment has no application to a call for service made by one’s government according to law to meet a public need, just as a call for money in such a case is taxation and not confiscation of property...(it is within the government’s power) under those parts of the Constitution which authorize Congress to declare war and raise and equip armies. There can be no doubt whatever that Congress has the constitutional power to require appellant, an able-bodied man, to serve in the army, or in lieu of such service to perform other work of national importance.”. See also *Howze v. United States*, 272 F.2d 146, 148 (9th Cir. 1959) Case holding that the compulsory civilian draft was not limited by the Thirteenth Amendment.

⁹³³ *United States v. Lambert*, 123 F.2d. 395, 396 (3rd Cir. 1941) The power to “provide for the common defense” and “to raise and support armies” was not to be interpreted in a way which “will make the power ineffective against an enemy, actual or potential.”

⁹³⁴ See *United States v. Henderson*, 180 F.2d. 711, 713 (7th Cir. 1950) In a case focusing on whether conscience objectors were unconstitutionally included in the peacetime draft, the court noted that Article I, Sect. VIII gave Congress “unqualified power” in order to protect the very existence of government, as there was neither express nor implied limitation in the Constitution to this power.

⁹³⁵ *United States v. O’Brien*, 391 U.S. 367, 377 (1968). The same term, Justice Douglas dissented from a denial of cert in *Holmes v. United States* to suggest that the Supreme Court had yet to directly address the question of peacetime conscription. See 391 U.S. 936, 938 (1968) (J. Douglas, dissenting) (“It is clear from our decisions that conscription is constitutionally permissible when there has been a declaration of war...(but in the absence of an declaration) our cases suggest (but do not decide) that there may not be.”).

rejected a challenge to the Military Selective Services Act of 1967 by a conscientious objector George William Crocker. In *United States v. Crocker*, Crocker argued that under Article I and the Second Amendment, Congress had no power to conscript “armies,” as they could only compel military service by “calling forth the militia,” and the Military Selective Service Act of 1967 was not a “proper” means of “raising armies” under the “necessary and proper” Clause because it circumvented the constitutional process for “calling forth the militia.”⁹³⁶ The Eighth Circuit also denied a claim that draftees could not be conscription for the Vietnam War because it was an undeclared war.⁹³⁷

Meanwhile, in 1969, Friedman published the arguments at the heart of his briefs as a book entitled, “Conscription and the Constitution.” Friedman argued that the Constitutional convention, *Federalist Papers* and state ratifying conventions showed that the “contemporary understanding” of the time was that the “regular army would be composed of volunteers who could not legitimately object if they were exposed to the dangers of questionable domestic conflicts or foreign entanglements.”⁹³⁸ History, Friedman claimed, showed that the framers gave the federal government wide powers to *use* the army but not to *gather it* while granting the militia specified *functions* with its power source unlimited. In particular, he sought to revisit White’s opinion in the *Selective Services Cases*. Friedman argued that White’s opinion dismissed “in a single sentence” the arguments against conscription made only decades after ratification as “irrelevant.” He noted that this statement “blithely dismissed” the most significant part of the Monroe Plan, in that Congress never passed the proposal due to the opposition of a “substantial

⁹³⁶ *United States v. Crocker*, 420 F.2d. 307, 308 (8th Cir. 1970).

⁹³⁷ *See also United States v. Murray*, 321 F. Supp. 1012, 1013 (Minn. 1971) (upholding *Crocker* and *Garrity* in conscientious objector case)

⁹³⁸ Leon Friedman. *Conscription and the Constitution: The Original Understanding*, 57 Mich. L. Rev. 1493, 1525 (1969).

number of congressmen” who did not believe the Federal Government held the power to pass a conscription law.⁹³⁹ As Friedman observed, the strong opposition made passage of the Monroe Plan impossible, while outside of Congress, the Hartford Convention later passed resolutions noting the unconstitutionality of federal conscription.⁹⁴⁰ Unfortunately for Friedman, he found no more legal success than the World War I opposition. Instead, he had to suffice with reminding his contemporaries of a long-forgotten constitutional drama.

If the constitutional drama over conscription seemingly ended with the Vietnam War, it is mostly because conscription ended with the removal of ground troops in December 1972. There has been no draft since, despite the continued presence of the Selective Service Act. Conscription looms as a sleeping issue for current and future generations. Without an active draft, it is difficult to foresee today’s judiciary ever hearing, let alone openly considering, a challenge to the constitutionality of the draft given that *Arver* is now a century-old precedent. The better lesson is that despite the closure of the judiciary to constitutional challenges to conscription over the twentieth century, lawyers and plaintiffs did not stop coming up with ways to revisit the issue and scholars have often noted the insufficiency of Chief Justice White’s opinion in *Arver*. That despite judicial reticence, legal actors continued to object to the constitutionality of conscription reflects the seriousness of the Civil War constitutional battles. Rediscovering that its

⁹³⁹ *Ibid.*, 1541-42. Friedman called some of the attacks “detailed,” as Senator Jeremiah Mason addressed the problem of whether the Constitution granted the power and found “several grounds” that it did not, as nothing in the Constitution “imposed limits upon the sweeping power” sought. Impressment under the power to “provide and maintain a navy” was something the British tried before the Revolution, not an American practice but “utterly repugnant” to the Constitution. Friedman notes the address made by Daniel Webster to the House of Representatives on December 9, 1814 that conscription went beyond the power to call out the militia and was a plan to raise a standing army. Webster had wondered if conscription would compel citizens “to fight the battles of any war in which the folly or the wickedness of government” may engage in. In Friedman’s view, Webster had “summarily dismissed” the Government’s claim of the power to conscript, as the “abominable doctrine” had “no foundation in the Constitution” or free government or “any notion of personal liberty.” If the claim that the power to “raise armies” granted such a power to conscript was allowed, Webster suggested the “reasoning could prove anything” and mean that whenever a legitimate power was found, “new powers may be assumed or usurped” when deemed expedient.

⁹⁴⁰ *Ibid.*, 1543-44.

constitutionality was never assumed informs us of that despite its current status, the draft was constitutionally resisted for a reason. Beyond base politics, conscription went against the volunteer tradition and was seen by nineteenth-century Americans as a harbinger of European despotism. It was not clearly intended to be a proper mode of exercising Congress's power to "raise and support armies," especially given how it conflicted with the residual state powers of the militia. Whether constitutional conservatives and later 20th century constitutional resisters were accurate in their opposition, they made an important contribution to our understanding of a number of constitutional issues that rises far beyond their immediate political goals.

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Ph.D. in United States History through Reconstruction, University of Mississippi, 2019
Dissertation, "Courtroom Wars: Constitutional Battles over Conscription in the Civil War North"
Minor fields: Legal History and Atlantic World History

J.D./M.A. in Legal History, University of Virginia School of Law, Charlottesville, VA, 2010

B.A. in History and Political Science, *summa cum laude*, Highest Distinction, University of Minnesota, Minneapolis, MN, 2007

ARTICLES

2017 Nicholas Mosvick, "Courtroom Wars: Pennsylvania Judges and Popular Constitutional Discourse in the Civil War North," 8 *Faulkner L. Rev.* 2, 269.

2016 Nicholas Mosvick, "Expand the Draft to Women - or Repeal It? A Long Constitutional Debate Continues," *The Conversation*, June 21, 2016. <https://theconversation.com/expand-the-draft-to-women-or-repeal-it-a-long-constitutional-debate-continues-60505>

2013 Nicholas Mosvick, *Book Review: Rehabilitating Lochner: A Study in the Limitations of Constitutional Revolution*, *Texas Review of Law & Politics*, Vol. 18, No. 1, 151-168.

2012 Ilya Shapiro & Nicholas Mosvick, *Politicians and Team Owners Snooker Sports Fans and Taxpayers*, HUFFINGTON POST, May 22, 2012, available at http://www.huffingtonpost.com/ilya-shapiro/sports-stadiums-taxes_b_1537177.html.

2011 Ilya Shapiro & Nicholas Mosvick, *Stare Decisis after Citizens United: When Should Courts Overturn Precedent*, *Chapman Journal of Law & Policy*, Vol. 16.

REVIEWS

2019 Book Review, D.H. Dilbeck, *A More Civil War: How the Union Waged Just War* (Chapel Hill: University of North Carolina Press, 2016), H-Net Book Reviews, *in progress*.

HONORS AND FELLOWSHIPS

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- 2014 “Politics in the Courtroom: The Case of *Kneedler v. Lane* and the Constitutionality of Conscription,” paper presented at the University of Alabama, Sixth Annual Conference on Power and Struggle, October 2014.
- 2014 “American Civil War Politics in the Courtroom,” panelist on *New Social Perspectives on the American Civil War* at the University of North Alabama, Sesquicentennial Conference on the American Civil War, October 2014.
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